U.S. Department of Labor

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Dated: 04/28/1999

Case No. 95-DBA-7

IN THE MATTER OF:

Disputes concerning the payment of prevailing wage rates and overtime wages by:

R.H.D. CONSTRUCTION CO., INC.
Prime Contractor

and

JOSEPH R. NOGUEIRA
President

and

Proposed debarment for labor standards violations by:

R.H.D. CONSTRUCTION CO., INC.
Prime Contractor

and

JOSEPH R. NOGUEIRA
President

With respect to laborers and mechanics employed by the prime contractor and its subcontractors under Contract No. Mass 23-1, Residing and Site Improvements of Curwin Circle, Lynn, Massachusetts; Contract No. Mass 31-2, Comprehensive Modernization of Highland Gardens, Somerville, Massachusetts; contract No. DTCGG1-93-C-3WK011, New Bathroom Renovation, Phase 3, Coast Guard Air Station, Cape Cod,

Otis ANGB, Falmouth, Massachusetts

Gail E. Glick, Esq.
David L. Baskin, Esq,
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For the Secretary of Labor

Paul M. Lane, Esq.
Boston, MA
For the Respondents

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a case for back wages and debarment arising under the Davis Bacon and Related Acts ("DBRA") (specifically the U.S. Housing Act of 1937), the Contract Work Hours and Safety Standards Act ("CWHSSA"), and the applicable regulations at 29 C.F.R. Parts 5 and 6.[1] A formal hearing was held in Boston, Massachusetts on the following dates: April 8-11, June 16-20, and June 30-July 3, 1997. The record was closed with the receipt of the parties' reply briefs on October 22, 1997. On April 13, 1999, I issued an *Order to Show Cause* why page 186, line 18 of the transcript should not be corrected, stating that while I was writing this decision I had found a significant error detrimental to the Secretary's case in the testimony of Barbara Baker, about whom much will be written in the following pages. Without objection, page 186, line 18 of the transcript is corrected to read as follows: "A. Three fifty-three, somewhere in there."

The Secretary contends that respondents failed to pay prevailing wages and applicable overtime wages in the amount of $118,979.83 to laborers and mechanics employed under Contract No. Mass 31-2, Highland Gardens, Somerville, Massachusetts ("Highland Gardens"), and Contract No. Mass 23-1, Curwin Circle, Lynn, Massachusetts ("Curwin Circle"), for work performed from the latter part of 1993 through early 1994.[2] The Secretary also alleges that respondents submitted falsified payroll records regarding these contracts. Finally, the Secretary contends that debarment in accordance with §5.12(a)(1) is appropriate due to these violations of law. Pursuant to requests from the Department of Labor, the Lynn Housing Authority withheld

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[1]All of the regulations cited in this decision are contained in Title 29 of the Code of Federal Regulations.

[2]Allegations that workers were underpaid a total of $27,540.68 under a third contract, No. DTCGG1-93-C-3WK011, Otis ANGB, Falmouth, Massachusetts, were dropped during the hearing. *See* TR 1632-33. The $27,540.68 that was withheld by the Coast Guard under that contract was released to RHD in September, 1997. *See Respondents' Post-Hearing Brief* at 27.

$50,000 from payment to RHD under the Curwin Circle contract (GX 23-24); and $72,000 was withheld from the Highland Gardens contract by the Somerville Housing Authority (GX 25-27).

As a preliminary matter, it is unfortunate that this decision has taken so long to be issued. However, neither party's post-hearing submissions were of much help in any regard, but particularly in determining whether back wages were owed and in calculating the amount of those back wages. Counsel for the Secretary failed to even attempt to reconcile contradictory testimony which impacted on the back wage calculations and ignored any evidence, regardless of its probative value, tending to reduce the amount of back wages which might be due. Counsel for the respondents did not make any back wage calculations, even in those cases where it is obvious that workers were either underpaid or not paid at all. Further, the quality of the evidence, both documentary and testimonial, was uniformly poor. In short, this decision was exceedingly difficult to write.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

a. Background

R.H.D. Construction Co., Inc. ("RHD") was incorporated in 1991. Joseph Nogueira founded the corporation, and he and his wife are its sole owners and directors (*see, e.g.*, TR 2425). Nogueira has a ninth grade education, at which time he dropped out of school to go to work (TR 2155-56). Nogueira apparently started in the construction business in the late 1970's (TR 2158), when he got a job with a construction company.[4] He performed several different jobs for this company until around 1980, when he became a union mason (TR 2159). Nogueira first went into business for himself, on a part-time basis, in about 1981, when he began rehabilitating old or damaged buildings and then either selling them or renting them out (TR 2161-65). He became successful enough in this line of work so that he was able to quit his mason's job in about 1982 (TR 2164). When the real estate market turned sour in the late 1980's, he got out of the building rehabilitation business (TR 2166-67). He then started RHD.

Although the business was started in 1991, RHD did not actually start functioning as a general contractor until sometime in 1992 (TR 2169). The three contracts with which this case originally was concerned were the first three federal contracts that RHD entered into. All of RHD's work involves public construction projects in Massachusetts. RHD now has six office employees and 27 field employees (TR 2393, 2430), and owns equipment valued at $2,500,000 (TR 2424).

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[3]Citations to the record of this proceeding will be abbreviated as follows: GX -- Government's Exhibit; RX -- Respondents' Exhibit; TR -- Hearing Transcript.

[4]Nogueira's testimony regarding the specific dates of his early construction employment are somewhat conflicting. But since this is simply background information, no attempt will be made to be more precise.

This case now concerns only two contracts, both of which are subject to the requirements of the Davis-Bacon Act, 40 U.S.C. §§276a-77 ("DBA") through the U.S. Housing Act of 1937, which is a Davis-Bacon related act (*see* §5.1 of the regulations), as well as the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-32. The Curwin Circle contract was awarded to RHD on June 22, 1993 and had a substantial completion date of September 29, 1994. It concerned re-siding and site improvements to a complex of approximately 30 two-story apartment buildings containing anywhere from two the eight units each (TR 75, 115). The buildings, which were occupied while the work was being performed, were owned by the Lynn (Massachusetts) Housing Authority (GX 1). The total contact price was $970,000 (*id*.). The Highland Gardens contract was awarded to RHD on September 8, 1993 and had a completion date of October 12, 1994. It concerned the renovation of a seven-story apartment building owned by the Somerville (Massachusetts) Housing Authority (GX 2). That building was unoccupied during this work. The contract was in the amount of $2,350,000.

The Curwin Circle contract was subject to wage determination number MA 930001, with one modification, which provided for hourly wage rates of $18.98 plus $7.84 in fringe benefits, totalling $26.82, for carpenters in Essex County, in which Lynn is located; and $17.10 (wages) and $6.20 (fringe benefits) totalling $23.30, for Group 1 building and residential laborers throughout the area it covers (*see* GX 4). The Highland Gardens contract was also subject to wage determination number MA 930001, but through a fifth modification. This wage determination provided that carpenters in Middlesex County, including Somerville, be paid hourly wages of $22.57 and fringe benefits of $8.72, for a total of $31.29; Group 1 laborers in the areas covered by the wage determination be paid wages of $17.10 and fringe benefits of $6.70, for a total of $23.80; and plasterers in Middlesex County be paid $25.85 in wages and $7.03 in fringe benefits, for a total of $32.88 (GX 5).

1. *Curwin Circle*

In regard to the Curwin Circle contract, RHD hired subcontactors in several different trades, including S-F Environmental to remove the old siding which was contaminated with lead paint, as well as excavation, paving and fencing subcontractors (TR 2180-81). Apparently none of these subcontracts resulted in investigations under the DBA. Rather, it was respondents' subcontractors and employees who installed the siding and trim who allegedly were underpaid. RHD began the re-siding and trim work in late August 1993. It subcontracted the work to R&B Carpentry, which was the business name used by Ron Baker since approximately 1987 (TR 320-22). Ron Baker previously worked under the name R & D Carpentry with his brother David, but changed the name to R&B when David went out on his own (TR 321). R&B was referred to by Ron Baker as a "DBA" (TR 330). It is unincorporated, uninsured, does not have its own place of business, and has not filed tax returns (TR 292, 329-31, 334). Nor did Ron Baker ever report the income he made from R & D or R&B on his own tax returns (TR 329-30).

R&B was selected to be the subcontractor for the siding work at Curwin Circle because of Nogueira's friendship with Ron Baker and Lynn Tumenas, who Nogueira believed jointly ran

R&B. [5] Tumenas, a long-time friend and co-worker of Ron Baker, became acquainted with Nogueira when Nogueira became involved in auto racing in 1992 (TR 315, 322-24). Tumenas became Nogueira's race car mechanic, and Ron Baker would help him out. Tumenas and Ron Baker traveled with Nogueira at Nogueira's expense to serve on his race crew at races in Connecticut, New York, and New Hampshire (TR 326). On two occasions in early 1993, Nogueira took both Tumenas and Ron Baker to Atlanta to work on his race crew (TR 316). Although Tumenas was paid by Nogueira for the work he did as his race car mechanic, Ron Baker only received pay for the trips to Atlanta (TR 326-27).

Nogueira first gave R&B a small job at North Street Elementary School in Tewksbury (TR 2188-90). When that was completed, Nogueira gave them another project, the renovation of two bathrooms at the Taft School in Allston (TR 441). Although that job began prior to the Curwin Circle project, it was not completed until the second week of work on Curwin Circle (TR 441-42).

Ron Baker contracted with Nogueira for R&B to do the siding work at Curwin Circle, including the metal trim, for $60 per square (TR 250, 2194; RX 85), a square being an area of 100 square feet (TR 253). In addition, Nogueira testified that R&B was to be paid separately for prefabricating dormers or canopies at RHD's office in Tewksbury and then hanging them on site at Curwin Circle. The payment was to be $100 per dormer (TR 2192-94; RX 88).

Working for R&B on a regular basis at Curwin Circle from August 23 to September 29, 1993 were Ron Baker, Dave Baker, and Lynn Tumenas. Also listed on R&B's payrolls in that period are David and Scott Janvrin, Leroy Fowler and William Bootman (GX 18), although only Bootman ever worked for R&B (*see infra*). R&B functioned as the siding subcontractor through September 29th (GX 18). At that time, according to Nogueira, he realized R&B was having trouble performing the work and making a profit, so he offered to take the R&B personnel on as RHD employees to complete the job (TR 2218). According to Ron Baker, they were having problems because Nogueira was not providing the laborers he promised, and therefore R&B workers had to do their own caulking, move supplies and clean up, activities which were very time-consuming (TR 254-56). Since R&B was being paid per square rather than on an hourly basis, that it was taking longer than anticipated to complete each square reduced the amount

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[5]Nogueira later came to believe that David Baker also was a principal in R&B (TR 2200).

The record contains various statements by Ron Baker regarding the make-up of R&B. He stated it is jointly owned and operated by himself, David Baker and Tumenas (RX 83); that it is jointly owned and operated by himself and Tumenas (TR 250); and that it was his business alone and Tumenas worked for him (TR 320-22). David Baker testified that he was hired by his brother to work for R&B at Curwin Circle (TR 76-77), and that prior to Curwin Circle he had never worked for R&B (TR 119); and Lynn Tumenas was not called to testify at the hearing. Since neither Baker brother was a credible witness (*see infra*), and the status of R&B is so amorphous in any event, it is impossible to determine whether either Tumenas or David Baker actually shared in the ownership and operation of R&B.

R&B was being paid (TR 259). Ron Baker testified that toward the end of September he told the project supervisor, Stanley Mitchell, that R&B was going to quit the job because it was not cost effective (TR 259); however, Mitchell was no longer at Curwin Circle by then, having been let go by Nogueira a day or two after Labor Day (TR 2149; GX 17). Thus Ron Baker's version of the events leading up to the end of R&B's role as a subcontractor at Curwin Circle is not credible. However, it is clear that R&B's workers, including the Bakers and Tumenas, became RHD employees at Curwin Circle on September 30.

After RHD took over from R&B, it increased the workforce to about 20 employees (GX 17). This arrangement -- that all of the workers were RHD employees -- continued until the week of Thanksgiving. At that point, the work on the Curwin Circle project was winding down, and some workers were going to be laid off. According to Nogueira, David Baker came to him and asked if his business, Baker Builders, could be given a subcontract to complete the re-siding work (TR 2253). David Baker contends that Nogueira came to him and asked him to take over the project with a crew of eight workers (TR 83-84). In any event, David Baker d/b/a Baker Builders and RHD entered into a contract for Baker Builders to re-side seven buildings at Curwin Circle for $18,936 (RX 96), and Baker Builders provided a crew of eight workers including David and Ronald Baker and Lynn Tumenas (GX 19). In addition, RHD still had about eight workers of its own at Curwin Circle who were correcting mistakes on buildings which had already been re-sided ("punch list" work) (GX 17; TR 2259). The contract with Baker Builders apparently was completed by December 17, 1993 (GX 19), and the remaining re-siding work by January 14, 1994 (GX 17).

DOL is contending that RHD underpaid its workers in several respects in regard to the Curwin Circle project. First, it alleges that workers working for so-called subcontractors, including alleged principals of these subcontractors, were paid a flat daily wage of $100 or $125 which was well below the prevailing wage rates. Second, DOL contends that RHD employees were required to work 1 1/2 hours of overtime each day for which they were not paid. Third, DOL contends that Barbara Baker, David Baker's wife, was employed on site as a painter at a wage rate substantially below the prevailing wage. Respondents do not dispute that the principals of the subcontractors as well as some of the subcontractors' employees may have been paid less than the prevailing wage rates, but contend that this was not volitional and/or was the fault of the subcontractors. Respondents also dispute that any overtime was worked at Curwin Circle other than on one Saturday morning. Finally, respondents argue that most of Barbara Baker's work was performed at its office, not on site at Curwin Circle, and thus was not subject to the Davis-Bacon Act.

2. *Highland Gardens*

Work on the Highland Gardens project started in October, 1993 (TR 2047, 2293; GX 20). Subcontractors were hired to perform much of the work, including the demolition of balconies, tile abatement, structural steel, elevators, plumbing, electrical, site improvement, cabinets, sprinkler system, roofing, masonry and concrete, doors and windows, plastering and painting (TR

2296-97). RHD had its own employees to do interior demolition and some carpentry. Most of these employees were paid solely as carpenters even though much of the work they were doing was the work of laborers (TR 2297-98; GX 20). Many of these employees also were working at Curwin Circle, including Ron and David Baker, William Bootman, David O'Rourke, Charles Harmen, Scott and David Janvrin, Scott Longacre, John Murray, Albert Scott, Norman Carpentier, Jeffrey Proia, Clayton Brown, Vincent Testa, Timothy Ulrich, Mark Croce and Richard Warren (*compare* GX 17 *with* GX 20). For the most part, RHD's employees were phased out by the beginning of December, and from December 5, 1993 through February 5, 1994, only three people --Marvin Pritchard, the project superintendent, Norman Carpentier, and Robert Nogueira, Joseph Nogueira's brother -- appear on the RHD payroll for Highland Gardens (GX 20; *see also* TR 2328).[6]

In early January, with the work at both Curwin Circle and Highland Gardens coming to an end for most of RHD's employees, Vincent Testa, an employee who worked as part of a crew with Ulrich, Croce and Harmen, asked Nogueira if there was any work available to him as a subcontractor (TR 2333). So Nogueira gave Testa a contract to do several different small jobs at Highland Gardens, including installing safety rails, for a total of $2900 (RX 56; TR 2333-37). Testa brought Ulrich, Croce and Harmen, who were his social friends and co-workers, to work with him under this subcontract, although he did not tell them that they were no longer working directly for RHD (TR 888-89, 1075-77). The crew finished most of the work, but did not install the safety rails (TR 2343). When Testa did not file a certificate of insurance that he had promised Nogueira he would file and balked over performing the safety rail work, Nogueira fired him and his crew, but paid Testa $1950 for the work they had performed (TR 2343; RX 57-58). Testa apparently kept all the money for himself, leaving his crew members with the impression that he had not been paid at all by RHD and that RHD owed them money (TR 889-90, 1056, 1077).

Also at Highland Gardens, RHD entered into a contract in mid-December, 1993 with H&D Drywall, a subcontractor specializing in residential drywall work (TR 1325), to perform drywall, plastering and insulation work within a period of 30 days (RX 24; TR 1327). The contract price was $47,830 (*id*.). H&D was owned by Eric Dinsmore, a long-time friend of RHD employee Norman Carpentier, who told him that bids were being taken for the drywall work at Highland Gardens (TR 1322-23). H&D submitted the low bid for the work (RX 20; TR 2355), and was awarded the contract. Nogueira did not know Dinsmore prior to his bidding on the Highland Gardens project (TR 2357).

H&D's workers[7] worked an 8 1/2 hour day, from 7:00 a.m. to 3:30 p.m., usually five days a week (TR 1334). Dinsmore was aware it was a prevailing wage job (TR 1328; RX 24, at 12),

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[6]Another person, Richard Warren, is listed on all of these payrolls, but he is not shown as having worked any hours, and there are no wages listed for him during this period.

[7]According to Dinsmore, all of his workers were independent contractors, not employees. TR 1332.

and the two payrolls in evidence, for the weeks ending December 24 and December 31, 1993 reflect the wage determination rates for carpenters and laborers applicable to the Highland Gardens project (GX 5). Dinsmore's original crew consisted of Edward Boyd ("Buddy"), Fred Rourke, Phil Nocella, Dan Genoter, Jason Butts ("Jay"), and Matthew Raza (TR 1361-62; GX 38). Boyd, Nocella and Genoter were carpenters; Butts was a laborer; and Rourke and Raza did both (TR 1333). Subsequently, another carpenter, Kevin Powers, was brought on (TR 1332-33; GX 38). Then Dinsmore brought in plasterers: Dave Zawodney and his crew, which included Harry Auch, George and Dan Stanichuck, and Rodney Renaud; Phil Vitello and his crew, which included Joe Recupero, Joe Storella and Joe Bulla; and Tom Coppola and Joe Conway (TR 1363-64).

Dinsmore had all sorts of problems in attempting to complete the work under his subcontract at Highland Gardens. During his direct examination he placed most of the blame on RHD, contending that Nogueira agreed to ignore the terms of the contract and advance him money to pay his workers every two weeks, and then failed to do so (TR 1327). But he was forced to admit on cross-examination that his problems were of his own doing. He underestimated the manpower needed to perform the work and accordingly seriously underbid the contract (TR 1403). This led in turn to his falling far behind, so that he could not meet the contractual completion date (TR 1403-05). As Dinsmore testified, the job turned out to be "like a living hell." (TR 1403). Then, when Nogueira paid two of the invoices submitted by Dinsmore totalling $8700 (RX 26, 31), Dinsmore used $3000 of this sum to pay off a bill from an unrelated job (TR 1337). On February 7, 1994, RHD notified Dinsmore that he had three days to come into compliance with the contract (RX 33). Within a few days H&D abandoned the job (TR 1406), and on February 11th RHD notified Dinsmore that it considered the contract terminated (RX 34). RHD hired another drywall company to complete the work (TR 2368).

In regard to Highland Gardens, DOL contends that RHD underpaid its workers by failing to pay H&D's workers the prevailing wage for plasterers, carpenters and laborers, and also for failing to pay them for all hours worked. DOL further contends that RHD's own employees were required to work 1 1/2 hours of overtime each day, for which they were not paid, and were underpaid for work performed on Saturdays; that workers in Vincent Testa's crew were not paid at all for work performed from December 30, 1993 through January 7, 1994; and that two workers, Jeffrey Proia and Mark Jurczak, were paid 40 cents an hour less than the prevailing wage for a laborer.

3. *Record Keeping and Other Violations*

In addition to the allegations regarding the underpayment of the workers, DOL contends that RHD and/or Nogueira:

1. Failed to keep accurate certified payroll records by recording workers' hours for one project on the payroll records of another project;

2. Falsified payroll records by understating the number of hours worked;

3. Failed to list some workers on the certified payrolls;

4. Assisted its subcontractors in falsifying their certified payrolls;

5. Used so-called subcontractors with the intended purpose of evading the prevailing wage requirements; and

6. Required its workers to work an additional 1 1/2 hours a day without pay, and threatened to fire them if they complained or refused.

DOL further contends that both RHD and Nogueira should be debarred from Federal contracts because all of these actions constitute willful and/or aggravated violations of the statutes in issue.

b. Legal standards

Although much was made by both parties of the legitimacy of the relationships between RHD and its subcontractors, whether R&B, Baker Builders, Janvrin Construction, Donald Overka, Testa Construction and H&D were true subcontractors or sham businesses set up as a means for respondents to avoid paying prevailing wage rates is immaterial to a determination of respondents' liability for back wages. For the law is clear that under the Davis-Bacon and Related Acts the prime contractor is liable for the obligations of its subcontractors to their employees. *See, e.g.*, *In re Northern Colorado Constructors, Ltd.*, WAB Case No. 86-31 (Dec. 14, 1987); *In re All Phase Electric Co.*, WAB Case No. 85-18 (June 16, 1986). Accordingly, RHD is liable for back wages due to any worker under the Curwin Circle and Highland Gardens contracts. That having been said, it is nevertheless strange that the Secretary elected not to proceed against Eric Dinsmore, who is primarily responsible for most of the back wages due in this case, since there is no question regarding the legitimacy of RHD's subcontract with H&D Drywall. Nogueira did not know Dinsmore or any of his workers prior to his solicitation of the drywall contract at Highland Gardens, and there is no contention that RHD profited in any way from Dinsmore's failure to complete his obligations under that contract.

It is also clear that principals of subcontractors must be paid wage determination rates for the time they spend working with tools under the contracts. *In re Labor Services, Inc.*, WAB Case No. 90-14 (1991). As the DBA states, "the contactor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work [at the wage determination rates] regardless of any contractual relationship which may be alleged to exist between the

contractor or subcontractor and such laborers and mechanics ...." 29 U.S.C. §276a(a). So even if R&B, Baker Builders, Janvrin Construction, Testa Construction and H&D Drywall are legitimate subcontractors, their owners and/or officers must be paid at the wage determination rates for any time they spent on site actually doing the work of a mechanic or laborer.

Respondents argue that equitable estoppel should be applied to this case to prohibit the Secretary from seeking back wages for the so-called "working subcontractors", *i.e.*, David and Ronald Baker, Lynn Tumenas, David and Scott Janvrin, Donald Overka and Eric Dinsmore. Whether equitable estoppel can be applied against the Secretary in cases such as this under the DBRA is at best uncertain. *See Griffin v. Reich, Secretary of Labor*, 956 F. Supp 98 (D.R.I. 1997). However, respondents have not established a basis to apply equitable estoppel even if the doctrine does apply to this case. Although respondents cite the HUD Handbook (RX 127) to show that working subcontractors are exempt from the DBA's prevailing wage requirements, there is no evidence that RHD either was aware of the HUD Handbook or relied on that handbook in bidding on the contracts at issue. Nogueira testified that he consulted William Pickett of the Department of Labor in regard to this issue and was informed that those workers owning at least 20% of the subcontractor do not have to be paid Davis-Bacon wages; but he stated that he did not do so until September 20, 1993, in response to an inquiry from the project architect (TR 2207-10). Both the Curwin Circle and Highland Gardens contracts had been entered into by then (*see* GX 1, 2). Accordingly, RHD could not have relied on erroneous advice Nogueira may have received from either HUD or DOL at the time it bid on the contracts; and it cannot be shown that affirmative misconduct on the part of the Government could have led RHD to believe it did not have to pay wage determination rates to working subcontractors. Therefore, the Secretary cannot be estopped from seeking to obtain back wages for the so-called working subcontractors.[8]

c. Discussion

Prior to addressing the individual elements of the Secretary's case, two points which go to the heart of this case must be addressed. First, the Secretary put on some of the least credible witnesses that I have ever encountered at a hearing. Two of the major players -- Ron Baker and Eric Dinsmore -- do not bother to report their income to the Internal Revenue Service. Ron Baker has not paid taxes on his income from R&B Carpentry or any of his other businesses for ten years, and Dinsmore apparently has not filed tax returns since 1992. Nor do they report their employees' income to the IRS. *See, e.g.*, TR 329-30, 1429. In addition Dinsmore, in his role as a

[8]Although the respondents also cite misinformation they received from the Coast Guard in connection with the Balashi Brothers contract in concluding that working subcontractors do not have to be paid Davis-Bacon Act wages (TR 2171-73), the Coast Guard is not a party to either the Curwin Circle or Highland Gardens contracts. It is hard to conceive that the doctrine of equitable estoppel could be applied against the Secretary of Labor due to misinformation received by a contractor from another agency which is not involved in the contracts to which estoppel is sought.

subcontractor, was paid money by RHD to pay other workers' wages but kept the money for himself (TR 1396), a practice also followed by another so-called subcontractor, Vincent Testa, the worker whose complaint to DOL led to this proceeding (TR 2341-42; RX 57). Moreover, Dinsmore lied to his workers repeatedly about when they should expect to get paid, in order to keep them on the job (TR 1589, 1607-08, 1614), and lied to Nogueira about being insured (TR 1380-81). Ron Baker testified that in late September he told Stanley Mitchell, RHD's supervisor for a short time at Curwin Circle, that he was quitting (TR 259). However, Mitchell left RHD's employ there around Labor Day. David and Barbara Baker filed certified payrolls which they state they knew were false. Barbara Baker misleadingly testified on direct that she was regularly on the Curwin Circle worksite painting dormers (TR 184-88), then had to acknowledge on cross examination that much of her work actually was performed at RHD's office in Tewskbury and at her home in New Hampshire (TR 208, 212). Her testimony about how she began doing this work also was less than forthcoming (*see* TR 179-80, 209-10). Mark Croce testified that he worked for RHD at Highland Gardens on the Friday and Saturday after Thanksgiving, 1993 (TR 875), days when no work was performed at that project. Dinsmore tried to claim that his certified payrolls understated the hours his men worked, which could increase his and their recovery in this case, but his own records confirm their accuracy (TR 1409-22).

In addition, although employee witnesses in DBA/DBRA cases usually are not disinterested parties, since they generally stand to be awarded back pay if DOL is successful, some of the workers in this case have crossed the line from mere interest to hostility toward the respondents. Included in this group are Ron and David Baker, Dinsmore, and Croce and Harmen, both of whom believed RHD did not pay them for work performed as part of Testa's crew when in actuality Testa kept their pay for himself. Others also have motives beside the pecuniary to be prejudiced against RHD or Nogueira. For example, the fathers of both Jeffrey Proia and Mark Jurczak were fired by RHD as site superintendents at Curwin Circle (TR 2314, 2317), and Mark Jurczak was himself fired (TR 2318). Others -- those who entered into subcontracts with RHD -- stand to profit by having RHD held liable for any violations of law and back wages for which they could be held responsible.

Further, although neither Testa nor Lynn Tumenas testified at the hearing, leaving big gaps in the record,[9] these men nevertheless played major roles in this case; and both are hostile to

[9]In this regard, it should be pointed out that RHD did not call Annette Smith, its former controller whose name came up frequently during the hearing, as a witness. Smith's testimony

RHD and/or Nogueira. Testa, whose complaint was responsible for initiating this proceeding and another proceeding against RHD at OSHA, was motivated to file these complaints because he wanted to aggravate Nogueira; the money he might recover was not important (TR 436-37). Concerning Tumenas, who may or may not have been a principal of R&B Carpentry and who introduced the Bakers to Nogueira, he had a falling out with Nogueira over the ownership of a race car Nogueira had helped him purchase.

Finally, even DOL itself, and particularly the Wage and Hour compliance officer who investigated this case, are tarnished in regard to the actions taken in this case. Both the compliance officer and Government counsel, in their prosecutorial zeal, seemed to lose sight of their objectivity. They appeared to believe everything they were told by everyone with an axe to grind against the respondents, and nothing by those who seem disinterested in the outcome of this proceeding. The compliance officer never even attempted to contact any disinterested witnesses to verify the workers' allegations prior to preparing back wage calculations and, when it came to his attention, ignored evidence from at least one disinterested witness that no overtime was worked (TR 1768-74). It also appears that the compliance officer either encouraged Dinsmore to exaggerate the hours his employees worked or turned a blind eye to the contradiction between the consistent pay records and Dinsmore's statements (TR 1409-22). Further, DOL botched the investigation regarding the third project originally at issue in this case, the Coast Guard Air Station at Otis ANGB, and embarrassingly had to drop that part of the case two months after the start of the trial.

Second, another troubling aspect of this case is the evidence that the Secretary had access to but elected not to produce at the hearing. For example, Ron Baker testified that he had copies of the paychecks he gave to the R&B workers, and showed them to Alfred Hammond, the compliance officer (TR 411). These checks would have shown exactly who worked for R&B, when they worked for R&B, and how much they were paid, all of which are vital in determining whether back wages are due to R&B's workers. But these checks were not produced. Also, Charles Harmen testified that he kept a contemporaneous ledger listing his work hours at Curwin Circle and Highland Gardens, and that he gave it to the Department of Labor in 1994 (TR 1031-34). Yet this ledger was not offered into evidence by the Secretary. I would hate to think that this evidence was not produced because it did not support the Secretary's allegations. But if the

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might have been very illuminating. It is interesting to note that, in its reply brief, DOL invites me to draw negative inferences from RHD's failure to call Smith as a witness. In this respect, the saying, "People who live in glass houses should not throw stones ..." immediately comes to mind. For if I am to draw negative inferences against RHD for failing to call Smith, then it would be incumbent upon me to also draw adverse inferences against DOL due to its failure to call Testa and Tumenas as witnesses. In fairness, Testa was supposed to testify on June 19, 1997, but allegedly there was a medical emergency at work with which he had to attend. Nevertheless, the hearing was not completed until July 2, and he was not rescheduled to testify. In any event, no request to draw adverse inferences from Smith's failure to testify was made during the hearing, and it is simply too late to suggest such a remedy in DOL's reply brief.

Secretary had access to highly probative evidence supporting her position on the key issues in this case, why was it not produced, especially when so much of the evidence the Secretary did produce was of dubious credibility? When considered in conjunction with Hammond's obvious lack of interest in credible evidence that no overtime was worked at Curwin Circle, this failure to produce probative evidence which was either in the Department's possession or readily available to it is unsettling.

1. *Unpaid Mandatory Overtime*

It is DOL's position that the carpenters and laborers on the Curwin Circle and Highland Gardens projects other than those who worked in connection with Dinsmore's drywall and plastering contract, regardless of when they worked on the projects or whether they worked directly for RHD or for one of the so-called subcontractors, worked about 1 1/2 hours of overtime each day for which they were not paid. This contention is supported by the testimony of Ron and David Baker, David Janvrin, Silvio Laudani, Mark Croce, and Charles Harmen, all of whom testified that they worked from 7:00 a.m. to about 5:00 p.m. at both projects from the time they started working at these sites until the work was completed or they were terminated. I find that this testimony was fabricated, and that no overtime was worked on these projects.

There are many reasons for discrediting the testimony of these workers. First, as was just noted, several of them are particularly lacking in credibility and/or have personal animus toward Nogueira. Second, their testimony was substantially contradicted by the testimony of two other workers, Jeffrey Proia and Mark Jurzcyk. Proia testified that he began working as a laborer at Curwin Circle on September 22, 1993, and that from the time he started there through October 17, 1993 the work shift was from 7:00 a.m. to 3:30 p.m. (TR 1124, 1153).[10] He added that, as a laborer who had to clean up after the other workers had finished for the day, he was one of the last people to leave the work site (TR 1219-20). Jurczak testified that in his first few days at Highland Gardens the work hours were 7:00 a.m. to 3:30 p.m. (TR 1283). Both Proia and Jurczak testified that they and Rick Warren and Bobby Nogueira had a meeting with Marvin Pritchard and Joe Nogueira in Pritchard's office at Highland Gardens on October 18th in which they were told they would have to work an extra hour a day without pay (TR 1154-55). They stated that at that point the work hours changed to 7:00 a.m. to 4:30 p.m. or later (TR 1160; 1283). For the reasons set out below, I do not accept that overtime hours were worked at either Curwin Circle or Highland Gardens even on the limited basis stated by Proia and Jurczak. But that two workers testified against their self-interest that no overtime was worked prior to October 18 seriously discredits the contrary testimony by other workers.

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[10]It appears that Proia incorrectly stated his work hours at Curwin Circle, since everyone else testified that the standard work day there was 7:30 a.m. to 4:00 p.m. The key point, however, is not that he said they worked from 7:00 to 3:30 but that he said they only worked an eight-hour day while he worked at Curwin Circle from September 22 through October 17. According to Proia, it was not until October 18 at Highland Gardens that he and some of the other workers were told to work an extra hour without additional pay (TR 1153-55).

Third, and of greater import, that any overtime was worked on these projects is totally refuted by four witnesses who appear completely disinterested in the outcome of this case, and a former employee of RHD who does not stand to benefit if DOL is successful and seems to have no bias one way or the other in regard to RHD or Nogueira. These five witnesses are George Jenkins, James Walsh, Paul Chiavaroli, Starr Hall, and Stanley Mitchell.

Mitchell was RHD's first site superintendent at Curwin Circle. He initially began working for RHD in June, 1993 as the site superintendent for the North Street School project (TR 2126-27). He moved to Curwin Circle when the North Street School project ended, about August 13, 1993 (TR 2128), and remained there only until approximately September 6, when he left RHD's employ in what was apparently a mutually agreeable termination (TR 2148-50).[11] Thus he was at Curwin Circle for about the first two weeks that R&B Carpentry was working there. It is Mitchell's testimony that he would arrive at the job site prior to 7:00 a.m., and that work would begin at 7:30 a.m. (TR 2133). In fact, work could not begin prior to 7:30 according to the Lynn Housing Authority, the owner of the apartment complex, because the buildings were occupied and they wanted the occupants to be inconvenienced as little as possible (TR 2134-35). Work had to end not later than 4:00 for the same reason (TR 3135). By the time he left at night all work had ceased and had been cleaned up (TR 2138). Mitchell testified unequivocally that no overtime work was performed during the short period he was the site superintendent at Curwin Circle (TR 2138).

James Walsh was the first clerk of the works at Curwin Circle. The clerk of the works (sometimes called the resident engineer) is employed by the property owner -- in this case the Lynn Housing Authority -- or the architect on behalf of the property owner, to insure compliance with the plans and specifications, monitor the progress and quality of the work, record all significant events which take place, and bring any discrepancies to the attention of the architect (TR 1895-96, 1901, 2044-45). In short, the clerk of the works oversees the construction work as the owner's representative (TR 1951). Among other things, the clerk keeps track of which contractors are on the job and how many workers they have on site, and also notes changes in the work schedule due to inclement weather. As an employee of the property owner or architect, which have no financial interest in the outcome of this case, a clerk of the works should be in a position to offer unbiased testimony regarding the work being performed under the contract.

Walsh started working at Curwin Circle in July, 1993 (TR 1953), and continued there as clerk of the works through October 18, when he fell and broke his left shoulder and was replaced by George Jenkins (TR 1977-78). Walsh testified that while he was clerk of the works, he would

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[11]Mitchell explained that he could only work a four-day week at Curwin Circle because he lives in New Hampshire, and Nogueira had to substitute for him on Fridays, a less than ideal situation. In addition, he had a business in New Hampshire that he started a year earlier which needed more of his attention. Therefore, it was in both his and Nogueira's interests to replace him at Curwin Circle. *See* TR 2148-50. Based on his short experience with RHD, it does not appear that Mitchell should be biased either for or against RHD or Nogueira.

arrive at the site between 7:15 and 7:30 in the morning (TR 1958) and leave at about 4:10 in the afternoon (TR 1962). During the entire time he worked at Curwin Circle, no work was performed before 7:30 a.m. (*id*.), nor was work ever performed after 4:00 p.m. (TR 1962). These were the hours they were permitted to work by agreement with the project's tenant association and tenant coordinator (TR 1993). Walsh also testified that he frequently talked to Donna Davis, the tenant coordinator on the Curwin Circle project for the Lynn Housing Authority who also lived there. It was her job to act as a buffer between the tenants and the Housing Authority. In this capacity, she would have been the person to receive tenants' complaints about the project. She never indicated to him that tenants were complaining about overtime work being performed. *See* TR 1964-66, 1996. Walsh was a very credible witness, and his testimony was convincing.

Walsh's successor as clerk of the works at Curwin Circle, George Jenkins, also testified, and likewise was a highly credible witness. Jenkins began his employment at Curwin Circle on November 9, 1993, and remained there until the end of the year and into 1994 (TR 1905, 1921, 1927). He testified that he would arrive at the site between 6:50 and 7:15 a.m., and that when he arrived no work was being performed (TR 1906). Further, as part of his duties, at the end of the day he would tour the site to see what had been done and to make sure there were no safety hazards (TR 1910). All work at the site stopped by 4:00 p.m. each day (TR 1910-13). He added that he was usually the last person to leave the site each day, although sometimes the site superintendent, Dan Campbell, would leave last (TR 1910-11). He would leave the site between the time the work ended and 4:45 p.m., and at least once was there until 5:00 p.m. (TR 1913, 1936-37).

Starr Hall, the clerk of the works at Highland Gardens for the entire period of that contract (TR 2045), also testified. Hall stated that he arrived at the worksite between 6:30 and 7:00 every morning, and that work started at 7:00 (TR 2068-69). He left the site at 3:30 in the afternoon or shortly thereafter (TR 2079). By the time he left, all work had stopped (TR 2079). Not only did he personally observe that work had stopped by that time, but he testified that "[n]o one had ever commented, complained or discussed working beyond 3:30." (TR 2080) He added that overtime was worked on several Saturdays, but only with the prior consent of the Somerville Housing Authority (TR 2097-98). Hall's testimony was spontaneous and candid. Moreover, his explanation of how he personally observed or subsequently became aware of everything that was going on at the site was both extraordinarily entertaining and totally believable. Finally, that he was at the work site before work began each day, and personally inspected the work site several times each day, was confirmed by some of the more credible workers (TR 1461-62, 1572, 1579, 1589-91). I fully credit his testimony.

DOL is grasping at straws in its attempt to discredit Walsh, Jenkins and Hall in its reply brief. In regard to Walsh, the contention that he only worked an eight hour work day, although technically accurate, is misleading. For one thing, he was required to be on site not later than 7:30 in the morning, and he could not leave until 4:00 in the afternoon. Although he was only paid for eight hours of work, he was required to be on site during an 8 1/2 hour period. Further,

he testified that he arrived at the site well before 7:30, and stayed later than 4:00, each day. Therefore, he clearly was on the site while the alleged overtime was being worked, and was able to observe whether work was ongoing before 7:30 or after 4:00. In regard to Jenkins, first, it is alleged that he "only toured the worksite by car." (*Complainant's Reply Brief*, third unnumbered page.) However, Jenkins testified that he "would walk the site continually to see the work that was in progress ...." (TR 1908-09; *see also* TR 1933). Further, he testified that when he did drive around the site, as he did at the start of each day (TR 1907), he had no trouble observing what was going on since the work was concentrated in small areas of the project and he could drive as slowly as he wanted (TR 1936). Second, DOL contends that Jenkins only worked an eight hour day, and was not at the site when the alleged overtime work was occurring. Again, the evidence contradicts DOL's contention. First, he testified that his prescribed work hours were from 7:00 a.m. to 4:00 p.m., which is a nine hour period (TR 1936), and he indicated that he spent more time than that at the site. In addition, since he arrived no later than 7:15, and routinely left each day later than 4:00, and after the work had been completed, he was at the site when the alleged overtime was being performed. Finally, as noted above, I found Hall to be an extremely credible witness, and I believe his testimony that all work had stopped by the time he left Highland Gardens each day at around 3:30.

The record also contains the testimony of Paul Chiavaroli, who was the Somerville Housing Authority modernization coordinator from October, 1993 through January, 1994 (TR 2005, 2019). In this position he had responsibility for two projects during the time at issue, the more substantial of which was Highland Gardens (TR 2008). Highland Gardens was just starting up when he went to work for the Somerville Housing Authority, and he was there at the preconstruction meeting. At that meeting, it was established that all requests to work overtime had to be approved by Chiavaroli's supervisor, the Director of Modernization, Mr. Faulkenberry (TR 2022). As part of his job duties, Chiavaroli would visit Highland Gardens twice a day. He would show up first at between 9:00 and 9:30 a.m., at which time work was ongoing, and stay there for about an hour (TR 2010-11). He would return to Highland Gardens for about 45 minutes in the afternoon, leaving there at about 3:15 p.m. (TR 2014). At the time he left, the workers were winding up their work for the day and getting ready to leave (TR 2014, 2030-31). Since one of his job duties was to check with the workers to see if they were receiving the proper wages, when he was on site he would interview workers about their wages and record their answers on forms (TR 2018). No one ever indicated to him that they were working overtime during the week at Highland Gardens (TR 2024), although overtime was approved for some Saturdays (TR 2022). In fact, it never came to his attention that anyone worked past 3:30 p.m. at Highland Gardens (TR 2031). Finally, Hammond, the DOL Compliance Officer who investigated this case, admitted that the Lynn Housing Authority contracting officer, Linda Hooley, never mentioned anything to him about overtime at Curwin Circle (TR 1767). Since the Curwin Circle housing units were occupied during the residing, and the work hours there were limited to 7:30 a.m. to 4:00 p.m. so as not to overly inconvenience the residents, it stands to reason that Hooley, who visited the work site two to three times a week (TR 1964), would have been made aware if work started earlier or ended later than it was supposed to on a regular basis.

The testimony of Mitchell, Chiavaroli, and the three clerks of the works is unambiguous

and consistent. Moreover, none of these witnesses appear to have had any reason to be less than candid. Mitchell now runs his own business in New Hampshire (TR 2121); Walsh is semi-retired and does some estimating for a steel fabrication company (TR 1953); Jenkins works as a resident engineer for Tischman Corporation on a parking lot construction project at Logan Airport (TR 1891); Hall is retired (TR 2033); and Chiavaroli works for the Housing Authority in another city (TR 2020). Only Mitchell worked for RHD, and that association was brief. None of the others still work for any of the companies or Governmental entities with whom they were associated in connection with Curwin Circle or Highland Gardens, and in any event these companies or governmental entities have no interest in the outcome of this case. When the testimony of these five individuals is weighed against the self-serving testimony of the workers who testified at the hearing, several of whom are utterly lacking in credibility, the conflicting testimony is easy to weigh. Accordingly, I find that the only overtime worked at both Curwin Circle and Highland Gardens occurred on a handful of Saturdays. No overtime occurred on any weekdays.

2. *Prevailing Wage Rates*

This category covers several different alleged violations of law. First, DOL contends that, while working for R&B, Baker Builders and other so-called subcontractors at both Curwin Circle and Highland Gardens, workers were paid either $100 or $125 per day rather than the prevailing wages. This is disputed by respondents other than in regard to the handful of Saturdays worked, when Nogueira agrees the workers were paid such fixed sums. Second, the Secretary contends that some workers did not get paid at all for some of the time they worked. Specifically, H&D only paid its workers for two of the weeks in which they worked, and Testa did not pay his crew for any work performed at Highland Gardens in early 1994. Third, the Secretary alleges that some workers, such as those in David Janvrin's crew, were paid on a per square basis which did not equal the prevailing wage rate. Fourth, it is contended that Barbara Baker was paid a fixed rate of $15 for painting dormers at Curwin Circle rather than the much higher prevailing wage rate. Fifth, the Secretary argues that two laborers, Jeffrey Proia and Mark Jurczak, were paid less than the applicable wage determination rates for their work.

It should be noted that the Secretary is not contending that the Curwin Circle wage determination rates were applicable to the construction and/or painting of dormers at RHD's Tewksbury office or at David and Barbara Baker's home. Therefore, the applicability of the Housing Act of 1937 to off-site construction will not be addressed in this decision.

(i) Fixed rates of $100 or $125 per day

There is ample testimony in the record that all of the work crews were paid fixed rates of $100 or $125 a day instead of the prevailing wage rates while working for R&B and Baker Builders, but there is no documentary evidence to back it up. Workers' earnings were not reported to the IRS, W-2s were not prepared, and with a single exception any Form 1099s which

may have been prepared are not in the record.[12] Moreover, the payroll records, such as they are, list the applicable prevailing wages, and the time sheets (RX 109-10) show an 8 1/2 work day, which includes a half-hour lunch break. Thus this allegation rests on the credibility of the workers, a dubious proposition in this case since I have already found some of the workers' testimony to be inherently incredible, and have rejected the testimony of others because more probative evidence indicates that their testimony on a key issue in this case was knowingly false.

Of particular interest was the testimony regarding the the pay received by the Baker Builders crew. This testimony indicates that for the four weeks Baker Builders operated at Curwin Circle it prepared knowingly false certified payrolls reflecting wages paid at prevailing rates, and gave its workers paychecks in the sums listed as net wages on those payrolls, but then the workers had to pay some of their wages to other employees so that everyone wound up making $125 a day. In addition to the inherent unbelievability of this scheme, as well as my considerable doubt that Baker Builders would have been capable of pulling it off -- even with the alleged help of Annette Smith -- this testimony is not credible.

For one thing, the certified payroll for the pay period ending on November 27, 1993, the first week Baker Builders was a subcontractor at Curwin Circle, lists net wages based on the applicable prevailing wage which are identical to the amounts on the paychecks issued for that work week (*see* GX 19, RX 135).[13] These wages add up to much more than $125 a day per worker if each of them only worked on the days indicated on the certified payroll, and substantially less than $125 a day if each crew member worked the full three days that week, as some testimony indicates (*e.g.*, TR 726-27) and the Secretary contends (*see* Secretary's Brief at Appendix A). In either event, the employees' testimony that they were paid $125 a day for the week of November 27, 1993 does not wash.

Second, that the Baker Builders workers did not receive the sums listed as net wages on the certified payrolls is predicated on the testimony of David and Barbara Baker that the payrolls were "fudged up" (TR 164-65, 193). Barbara Baker testified that she would manipulate the workers' hours listed on the payrolls so in the end, when averaged together, each worker would earn $125 a day (TR 232-35). However, the evidence indicates that for the first week of Baker Builders' operations, where Barbara Baker specifically stated that she misstated workers' hours, the total payroll for that week averages about $150 per day in take home pay, not $125, for each worker listed on the payroll. The accuracy of the payrolls in regard to the number of Baker Builders workers on site each day, at least for the first three of the four weeks it operated at Curwin Circle, is confirmed by the reports of the clerk of the works, which during Baker Builders' tenure was George Jenkins (RX 117). Moreover, the payrolls for the week ending December 4, 1993 appear to be totally accurate when compared to the clerk's reports, and there

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[12]The record does contain a Form 1099 for Mark Jurczak listing $250 in nonemployee compensation. *See infra*.

[13]In fact, this is true for each of the four weeks Baker Builders was on the job.

is only a single discrepency between the payroll and the clerk's report for the following week -- the payroll lists only seven crew members on site on December 9, whereas the clerk's report lists eight. Accordingly, the payrolls for those two weeks appear to be basically accurate. That the total of the net pay on the payrolls for those two weeks actually averages around $125 a day for each Baker Builders crew member is meaningless, since not every crew member worked every day. When the total net payroll of $4990.59 for the week ending December 4 is divided by the total number of days actually worked that week by the Baker Builders crew according to both the payroll and the clerk's reports -- 35 -- the average net pay per worker is $142.59. Similarly, for the week ending December 11, the total net payroll of $4967.40 divided by days actually worked -- either 35 according to the payroll or 36 according to the clerk's report -- equals an average net pay of either $141.93 or $137.98 per crew member per day.

Third, the testimony regarding the distribution of the money among the workers is inconsistent and thus not credible. For example, Silvio Laudani testified that he worked three days in the week ending December 18, 1993 for which, at $125 a day, he should have been paid $375 (TR 733). Yet the payroll lists him as receiving $479.35 in net wages for that week (GX 19). He testified that he was paid both by check and in cash for that pay period, and he was supposed to pay the surplus cash to someone else so that both of them actually would be paid $125 a day (TR 733). However, Laudani's pay check dated December 17, 1993, the last work day in that pay period, was in the amount of $479.35 (RX 135), the full amount of his net wages listed on the certified payroll. David Janvrin testified that, regardless of the amount of his paychecks, he was only being paid $125 a day at Curwin Circle (TR 596-97). He stated that he and his brother Scott, who also worked for Baker Builders, were supposed to pass money between themselves from their paychecks so that they both wound up making $125 a day (TR 597-98, 649-50). Allegedly, if David's paycheck came to more than $125 a day, he gave the surplus to Scott, and vice versa. The problem with this testimony is that the math does not work. For example, David Janvrin testified that he worked three days during the pay period ending November 27, 1993 (TR 597) for which he received a check in the amount on the certified payroll --$443.35 (RX 135). Scott Janvrin is listed on the certified payroll as working one day, for which he received a check for $161.33 (*id*.). If in fact Scott worked only one day that week, then the total net pay of both Janvrins would have averaged over $150 a day. However, if Scott worked the same three days that David worked that week, as the Secretary alleges (*see Secretary's Brief*, Appendix A, at 8-9), the total of their paychecks would have averaged only $100.78 per day. Only if Scott worked two days that week would their net pay average something around $125 a day -- $120.94-- but there is no basis to assume he worked two days that week since the payroll said he worked only one day and David worked three days. Similarly, if David's and Scott's paychecks for the pay period ending December 11, 1993 are added together and and the total is divided by ten (assuming that both worked each day that week, as DOL contends), they would have received only $111.34 a day, whereas if Scott worked only the three days indicated on the payroll their joint net pay would have been over $139 a day. It is only if Scott worked only four days that week that their wages would average about $125 a day (actually $123.71), but again there is no basis to find that Scott worked four days that week as opposed to either the three days on the payroll or the five that David allegedly worked.

Therefore, the evidence fails to prove that the certified payrolls for Baker Builders are inaccurate. These payrolls indicate that Baker Builders paid its workers at wage determination rates. Accordingly, there is no basis to award back wages to the Baker Builders workers.

In regard to R&B Carpentry, it was a subcontractor at Curwin Circle from August 23 through September 29, 1993, at which time its workers became RHD employees (GX 17-18). Although other people appear on its certified payrolls (*see* GX 18), and the clerk of the works' reports list as many as six people working on site for R&B (*see infra*), both Ron and David Baker testified that R&B's only other workers at Curwin Circle were Tumenas and William Bootman (TR 125, 255), and the Secretary does not contend otherwise (*see Secretary's Brief* at 3).

In order to determine whether R&B's workers were paid at the wage determination rate, two things must be established -- the number of hours each man worked and the amount each was paid. The problem in this regard, a problem which recurs frequently in this case, is that there is little credible evidence in the record on which to base such determinations. Neither Ron nor David Baker was a credible witness; Nogueira's testimony was self-serving and thus suspect; and neither Tumenas nor Bootman testified. The documentary evidence also is unreliable. First, the certified payrolls for R&B are of doubtful authenticity. Although they are signed in Lynn Tumenas's name, Ron Baker testified that Tumenas told him he did not prepare them, and he stated that he did not prepare the payrolls either (TR 292-95). But this clearly self-serving testimony is no more believable than Ron Baker's other testimony. Nogueira testified that he received the R&B payrolls from Tumenas (TR 2205-06). However, this is difficult to believe. For most of R&B's certified payrolls are labeled revisions, and are dated either January 31, 1994 or February 8, 1994. Nogueira testified that he repossessed Tumenas's race car in January, 1994, and it appears he and Tumenas had nothing to do with each other thereafter (*e.g.*, TR 2276-77). It is unclear why Tumenas subsequently would have filed revised payrolls. Second, whoever prepared the payrolls, they are fabrications. As was stated above, R&B consisted of only Ron Baker, David Baker, Tumenas and Bootman. Yet David Janvrin, who never worked for R&B (*see* TR 125, 255, 488-92, 2280-81), is also listed on its payrolls, as is his brother Scott and Leroy Fowler, other members of David Janvrin's crew. Moreover, David Janvrin and his crew did not start work at Curwin Circle until the third week of September (RX 116, Clerk's Report 39; TR 492), whereas R&B's payrolls list hours for him starting on August 23rd, and for Scott Janvrin and Leroy Fowler beginning on August 31 or September 1 (GX 18). Accordingly, the R&B certified payrolls are worthless.

The only other documentary evidence relevant to the issue of when R&B's workers worked at Curwin Circle is the clerk of the works' reports during that period (RX 116-17). While R&B was a subcontractor at Curwin Circle, Jim Walsh was the clerk of the works. Although these reports are accurate in most respects, and will be relied on many times in this decision, in regard to R&B they contain a significant discrepency. For on August 31 through September 2, they list R&B as having six workers on site, and on September 23, R&B is listed as having five workers on site. R&B never had more than four workers. Further, four workers are

listed on September 21, 24, and 27-29, but by then Bootman apparently had left R&B (*see infra*). Walsh was not asked to explain these discrepencies during his testimony, and thus we do not know who he counted as R&B workers.

Despite these discrepencies, the clerk's reports are still helpful in determining the number of hours R&B's workers put in at Curwin Circle. For one thing, the reports indicate the dates on which R&B did not work, as well as days where work ended earlier than 4:00 p.m. Further, since the reports are inaccurate in regard to R&B in *overstating* the number of workers on site, there is no reason to believe that they *understate* the number of R&B workers on site. Accordingly, when the reports indicate there were only two or three R&B workers on site they can be credited.

Since there is little credible evidence, it is difficult to determine exactly how long anyone worked and how much they got paid. There is virtually no evidence in the record regarding the work Bootman did for R&B. He did not testify at the hearing. He is mentioned very briefly a few times in the transcript of the hearing as the only worker for R&B other than the Baker brothers and Tumenas. But nowhere in the transcript is there any real discussion of what he did or when he worked for R&B. As for the documentary evidence, he is listed on the certified payrolls for R&B on seven different days, working a total of 48 hours (GX 18).[14] After R&B's workers were absorbed by RHD, he is listed on the RHD payrolls starting on September 30, but so are several other workers who did not work either for R&B or RHD earlier. These include Leonard Collibee, Michael Dowling, Scott Longacre, and Horace Matsavage. Accordingly, it cannot be concluded that he worked for R&B up to September 29 simply because he appears on RHD's payrolls for the first time on the day R&B's workers became RHD employees. Moreover, on July 14, 1994, Hammond prepared back wage calculations for the four R&B workers -- Ron and David Baker, Tumenas and Bootman (RX 90). At that time he contended that back wages of between $2676 and $3369 were owed to the Bakers and Tumenas, but only $178 was owed to Bootman, who was alleged to have last worked for R&B during the week ending September 18, 1993. The sum of $178 would cover only about two days of back wages even for a laborer based on the Secretary's assumption that R&B's workers were paid $100 a day as compared to the wage determination rate for a laborer of $186.40.[15] The record is silent about what changed between 1994 and 1997 to cause the Secretary to now conclude that Bootman worked for R&B for 16 1/2 days and is entitled to over $2000 in back wages. Therefore, although it is known that Bootman worked for R&B at Curwin Circle, there is no credible evidence establishing the length

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[14]The Secretary's calculation of back pay for Bootman is based on incorrect statements regarding when R&B's certified payrolls (GX 18) show him as working. The payrolls list Bootman as having worked 4 hours on August 31; 4 hours on September 7; and 40 hours from September 13-17. The *Secretary's Brief*, Appendix A at 4, inexplicably states that these payrolls show him working a total of 16 1/2 days.

[15]For some unexplained reason, the Secretary's back wage calculations assume that Bootman was a laborer (*see Secretary's Brief*, Appendix A at 4). Although the certified payrolls for R&B list Bootman as a laborer, those payrolls are worthless. There is nothing else in the record that would lead to a conclusion that Bootman did not work as a carpenter for R&B.

of that employment which, in any event, must have had a very short duration.

In *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 66 S.Ct. 1187 (1946), which is the seminal case concerning an employee's burden of proof in establishing entitlement to back wages to remedy an underpayment by the employer, the Supreme Court stated:

> [W]here the employer's records are inaccurate or inadequate ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.
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> ... [W]e are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute.

Id. at 1192-93. This holding has been applied to cases arising under the DBRA. *See, e.g., In re Structural Services*, WAB Case No. 82-13 (1983). Under *Mt. Clemens*, the initial question is whether the employee, or in DBRA cases, the Secretary, has met the burden of establishing that the employee performed work for which he was not properly paid, as well as establishing by some reasonable means the amount and extent of such work. The Secretary has not met this burden. All that the Secretary has shown is that Bootman worked for R&B at Curwin Circle for an undetermined but very short period. No effort was made to establish Bootman's job duties, how long he worked, or how much he was paid. He was not called as a witness; and the witnesses who did testify and were in a position to provide details about his employment at R&B were not asked to do so. Further, the Secretary did not produce Bootman's paychecks from R&B despite the fact that they were available. Accordingly, since the Secretary has failed to provide "sufficient evidence to show the amount and extent of [Bootman's] work as a matter of just and reasonable inference ...[,]" back wages cannot be calculated for Bootman.

Moreover, the Secretary's contention that R&B's workers were underpaid is premised on a finding that Nogueira paid R&B only enough for Ron Baker, Tumenas and Bootman to be paid $100 a day, and David Baker $125 a day, rather than the wage determination rate of $26.82 an hour. The record does not support such a finding. First, it should be noted that this is one of many instances in this case where the Secretary failed to address an obvious inconsistency in the testimony of her witnesses,[16] and for purposes of arguing for back wages simply assumed that each witness's testimony was accurate. This burying her head in the sand approach is

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[16]Ron Baker testified that he was paid $100 per day per worker by Nogueira (TR 261), whereas David Baker testified he was paid $125 a day for his work for R&B (TR 77-78).

disingenuous and unprofessional, especially since, for the purpose of calculating back wages for Tumenas and Bootman, who did not testify, the Secretary assumed without discussion that they were paid the lesser amount. Second, although Nogueira initially did pay Ron Baker only $100 per day per worker, the Secretary acknowledges (*see Secretary's Brief* at 4) that these were advance payments because, under the contract, R&B was not entitled to receive the $60 per square contract price until it completed discrete sections of the job. Ron Baker testified that once the work was completed, he was paid the rest of the money due under the contract (TR 261-62). The Secretary failed to acknowledge this testimony in her brief. Accordingly, unless Ron Baker kept all the additional money for himself, the R&B workers were paid substantially more than $100 per day.

RHD issued checks to R&B for workers' wages pursuant to its contract with R&B (RX 85) totalling $14,390 during the period R&B was working at Curwin Circle (RX 88), of which $11,390 went to the crew's wages for work at Curwin Circle.[17] Based on the clerk of the works' reports (RX 116, 117), R&B worked at Curwin Circle on 24 calendar days between August 23 and September 29, 1993. Assuming Ron and David Baker and Tumenas worked a full day each of these 24 days, they would have combined to work 72 days. But the clerk's reports also state that on at least four days (September 8, 17, 22 and 27) R&B did not work a full day, and on three days (August 25 and 26, September 22) only two workers were on site for R&B. Factoring in these deductions, which add up to about six days of work, lowers the total days worked by the Bakers and Tumenas to 66. Dividing the sum R&B was paid for wages at Curwin Circle -- $11,390 -- by 66 equals $172.58. Thus each of the three was paid $172.58 a day to work at Curwin Circle for R&B. The wage determination rate for carpenters for an eight-hour day equals $214.56. Therefore, each man was underpaid $41.98 per day by R&B at Curwin Circle, for a combined total of $2770.68. Divided equally among them, each is owed $923.56 for their work for R&B Carpetry at Curwin Circle.

Finally, Nogueira admits that he paid workers a flat $125 a day to perform work at Highland Gardens, Curwin Circle and at their office in Tewksbury on some Saturdays (TR 2192-93, 2247-48, 2309-10). He stated that this occurred on one morning at Curwin Circle in November; three mornings at Highland Gardens, two of which were definitely October 9 and 16; and a few days at RHD's office in Tewksbury. Although he stated that these workdays lasted only four hours, he admitted that the payrolls he prepared for October 9 and 16 list five hours of work for each employee (TR 2319-20). Ron Baker testified that the only Saturday work he performed was at RHD's office in Tewksbury, building dormers for the Curwin Circle project (TR 287). David Baker offered similar testimony (TR 90-92). David Janvrin testified to working two consecutive Saturdays "sandwiched around the first week of November" (TR 548-49). Charles Harmen testified to working with Testa's crew on two Saturdays at Tewksbury, apparently doing some small jobs having nothing to do with either the Curwin Circle or Highland Gardens contracts (TR 1001-04), and two or three additional Saturdays doing demolition work at

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[17]RHD issued other checks to R&B to pay for supplies (s*ee* RX 87) and and the dormers which were built off-site at RHD's office (TR 2214-15).

Highland Gardens for the entire day (TR 1004). Mark Croce, another member of Testa's crew, remembered working four full Saturdays at Highland Gardens doing metal stud framing, but said nothing about Saturday work at Tewksbury (TR 831). Jeffrey Proia testified to working two Saturdays, from 7:00 a.m. to 3:30 p.m., at Highland Gardens (TR 1176), and Mark Jurczak testified to working three Saturdays there (TR 1270), from 7:00 a.m. to 4:30 p.m. Jurczak testified that he was sure this work occurred on the first three Saturdays in October (TR 1270); Proia thought he worked the last two Saturdays in October (TR 1177); and Croce, who according to the payrolls did not begin working for RHD until November 1, stated both that his first day of work for RHD was a Saturday at the end of October at Highland Gardens (TR 761) and that the four Saturdays he worked could have been anytime from November until early January (TR 831) and included the Saturday after Thanksgiving (TR 847, 875).[18] Interestingly, no one testified to working on a Saturday at Curwin Circle.[19]

In regard to this Saturday work, there are several issues to address. First, which of the workers actually performed work on Saturdays? As is indicated above, the testimony regarding when Saturday work occurred is highly conflicting, and neither party made any effort to resolve these conflicts in their briefs. The Secretary's utterly simplistic approach was to accept each worker's testimony regarding this work regardless of its inconsistency with other testimony and ask for back wages for everyone. This is not an acceptable approach. Rather, an attempt must be made to determine when this work occurred. In this regard, the reports of the clerk of the works at Highland Gardens is of immeasurable help. Starr Hall prepared daily reports as part of his duties as clerk of the works. These reports, starting from October 12, which is his fourth report, are in the record (RX 54).[20] Report number 8 notes there was work on the previous Saturday, which would have been October 16; report number 18 notes that a half day was worked the previous Saturday, which was October 30; report number 32 notes that there was work on Saturday, November 20; report number 74 notes that four plasterers worked on the previous Saturday, which would have been January 22, 1994; report number 79 notes that the general contractor (RHD) had nine workers on site on the previous Saturday, which was January 29; and report number 83-A reports two RHD workers on site on Saturday, February 5. The reports end on February 8, 1994. Report number 35 notes there was no work performed on either Friday, November 26 or Saturday, November 27, which is consistent with the certified payroll for those days (GX 20).

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[18]Croce also was sure he worked the Friday after Thanksgiving. TR 847, 875.

[19]There was testimony that work occurred on Veteran's Day at Curwin Circle, and the certified payrolls for Curwin Circle indicate that all of RHD's employees worked eight hours on Veteran's Day and received a regular day's pay. Accordingly, testimony that employees worked on Veteran's Day is consistent with the payrolls. Although it may be that employees are entitled to time and a half for working on a contractual holiday, no such allegation was raised by the Secretary.

[20]There is no indication of why his first three reports are missing.

I credit these reports, and find that the Saturdays listed in them are the only Saturdays worked at Highland Gardens during the period they cover. I also find, consistent with Nogueira's testimony, that work at Highland Gardens occurred on October 9. Thus RHD had workers at Highland Gardens on the following Saturdays: October 9, October 16, October 30, November 20, January 22, January 29, and February 5. The Secretary is not contending that any workers are due back wages for Saturdays after the beginning of January, 1994. Therefore, that work may have occurred on January 22, January 29 and February 5 is irrelevant to this decision. The only four Saturdays which are relevant are October 9, October 16, October 30 and November 20.

The Secretary is seeking Saturday pay for the following individuals: Croce -- four days; Harmen -- three days; Mark Jurczak -- three days; Jeffrey Proia -- two days; Testa -- three days; Ulrich -- three days; and David Janvrin -- two days.[21] The Secretary seems to find nothing strange in contending that Croce worked four Saturdays and Testa, Harmen and Ulrich only three despite testimony from both Croce and Harmen that their Saturday work was with their full crew, *i.e.*, Testa, Harmen, Croce and Ulrich (TR 1004, 832). However, I do not fully accept the testimony of either Croce or Harmen. In regard to Croce, his testimony that he worked four Saturdays at Highland Gardens is clearly inaccurate. For one thing, even if he began working for RHD on Saturday, October 30, there was only one other Saturday during his employment with RHD when work was performed at Highland Gardens. So he could not have worked there more than two Saturdays. Moreover, his insistence that he worked both the Friday and Saturday after Thanksgiving at Highland Gardens, days when no work occurred there, seriously erodes his credibility. On the other hand, Harmen's testimony that his entire crew worked two to three Saturdays at Highland Gardens, when reduced to the two days rather than three, is consistent with the records of when work occurred as well as the length of time Testa's crew was together, assuming Croce started on October 30. Accordingly, I find that Testa's crew worked on both October 30 and November 20. I also accept Jeffrey Proia's and Mark Jurczak's testimony that they worked two and three Saturdays respectively in October, even though they are probably wrong about the exact dates they worked, since their testimony is relatively consistent with the evidence of the specific days worked at Highland Gardens. Finally, David Janvrin's testimony that he worked two consecutive Saturdays at Highland Garden in the beginning of November is inconsistent both with the days work occurred there on Saturdays and with the certified payrolls, which indicate that he worked at Curwin Circle the first week of November. Nevertheless, I will credit him with working at Highland Gardens on October 30, the first Saturday he contends he worked there.

The next issue is the length of the Saturday work days. Nogueira initially contended that the workers put in only a half day, but later conceded that payrolls prepared for Saturday, October 9 and Saturday, October 16 state that five hours were worked at Highland Gardens on

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[21]The Secretary is not asking for additional pay for Scott Janvrin even though David Janvrin testified that he worked with Scott on the two Saturdays he said he worked (TR 560).

these days (TR 2318-19).[22] The workers contend they worked a normal work day of at least eight hours. Although Nogueira's testimony was consistently self-serving and sometimes problematical, he was a more credible witness than his workers. Accordingly, I find that they worked only five hours on the Saturdays they worked. The prevailing hourly wage was $30.41 for carpenters and $23.80 for laborers at Highland Gardens, meaning that carpenters should have been paid $152.02 and laborers $119 for the five hours of work. On this basis alone, all of the workers were underpaid for their Saturday hours. But, in addition, respondents have not met their obligation to pay overtime wage rates under CWHSSA for some of the Saturday hours, since the workers were entitled to overtime pay where working on Saturday put them over 40 hours for the week. At Highland Gardens, time and a half would be $42.58 for carpenters and $32.35 for laborers.

The record establishes that Testa's crew members each worked 39 hours from November 15-19 (GX 17, 32), so each worked one hour of regular time and four hours of overtime on November 20. For the week ending October 30, Testa, Harmen and Ulrich each worked 40 hours from Monday to Friday divided between Curwin Circle and Highland Gardens, and thus all five hours on Saturday were overtime. Croce's first day with RHD was October 30, so the five hours he worked that day was his entire work week. In regard to David Janvrin, since he put in 39 1/2 hours from Monday to Friday that week at Curwin Circle (32 hours) and Highland Gardens (7 1/2 hours) combined (*see* GX 17, 20), he is entitled to 1/2 hour of regular time and 4 1/2 hours of overtime for October 30. All of Jeffrey Proia's Saturday hours in October were overtime, since he worked 40 hours from Monday to Friday each week that month (*see* GX 34). Finally, in regard to Mark Jurczak, his hours on October 9 were at regular pay, since he only worked 24 hours the week before, and on October 16 were all overtime, since he worked 40 hours from Monday to Friday that week (*see* GX 35). But he was not on the payroll for the week prior to October 30, and worked only one day the following week, at which time it appears he was fired. So his five hours on October 30 should be at regular pay.

For carpenters, five hours of overtime pay equals $212.88. Since they were paid $125 for each Saturday they worked, where the entire five hours worked were overtime they were underpaid $87.88. Thus for October 30, Testa, Harmen and Ulrich were underpaid $87.88.[23] Croce's work on that day was at regular pay, which for five hours equals $152.05. Since he was paid $125 for that day's work, he was underpaid $27.05. For November 20, Testa's entire crew should have received $201.61 for one hour of regular pay and four hours of overtime. Subtracting the $125 they each were paid, each crew member was underpaid $76.61 on November 20. As far as Janvrin is concerned, he should have received $207.26 for 1/2 hour at his regular wage rate and 4 1/2 hours of overtime for working on October 30. Deducting the $125 he was paid, he was underpaid $82.26 on October 30.

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[22]These payrolls, which had been part of GX 20, were excluded from evidence since they were unsigned and were never turned in by RHD.

[23]Testa, however, is not entitled to any back wages. *See infra*.

In regard to Proia and Jurczak, overtime pay for five hours for laborers is $161.75. Proia was paid $100 for each of the two Saturdays he worked. Thus he was underpaid $61.75 each day. Jurczak testified that, for the three Saturdays he worked, he was paid $125 twice and $100 once, or vice versa. I find it was the former, since GX 35 contains a Form 1099 listing $250 as nonemployee compensation. This is consistent with being paid $125 twice rather than the other way around. For the three Saturdays he worked, Jurczak should have been paid $399.75 (regular pay of $119 twice, and overtime pay of $161.75 once). In fact, he was paid $350. Thus he was underpaid $49.75.

(ii) Unpaid work

(a) H&D Drywall

As stated above, H&D Drywall employed carpenters, laborers and plasters at Highland Gardens. The prevailing wage rates for these classifications were $31.29, $23.80 and $33.83 respectively. H&D started working at Highland Gardens on December 13, 1993; its last day there was February 9, 1994 (*see* GX 38). RHD made two partial payments to H&D under the contract totalling $8,700 (GX 36). However, Eric Dinsmore only paid his employees for the work weeks ending December 23 and December 31, 1993, as is reflected in the two certified payrolls he prepared for H&D (GX 21; TR 1339). These payrolls are accurate in listing the hours worked and the sums actually received by the workers for these two weeks, totalling $5,763.98 (TR 1467, 1533-34), These payrolls did not list any wages for Dinsmore. Other than the payments reflected on the payrolls for the weeks ending December 24 and December 31, no other wages were paid to H&D's employees or the other workers brought in by H&D (*e.g.* TR 1611-12). However, of the money paid by RHD to Dinsmore, he did not disburse $2,986.02 to any workers.

In regard to back wages due to those workers employed at Highland Gardens by H&D, the Secretary's proposed findings are relatively accurate other than in regard to Dan Genoter. The Secretary contends that Genoter worked a total of only 269.5 hours at Highland Gardens, where as the combination of the two payrolls and Dinsmore's records establish that he worked 308.5 hours, of which 8 were overtime (he worked 48 hours the week ending January 14, 1994). The following chart summarizes the hours worked at Highland Gardens other than for the two weeks for which the workers were paid, since this period is no longer in issue (*see* GX 38-40; TR 1563-65):

	HOURS WORKED DURING PAY PERIOD ENDING										
Name	12-17-93	1-7-94	1-14-94	1-21-94	1-28-94	2-4-94	2-11-94	Unspecified	Total Hours	Wage Rate	Back Wages Due
Edward Boyd*	37	0	0	0	40	40	24	0	141	$31.29 X 37	$1,157.73
										$33.83 X 104	$3,518.32
Fred Rourke	24	0	0	0	0	0	0	0	24	$23.80	$571.20

Phil Nocella	31	36	24	24	0	40	24	0	179	$31.29	$5,600.91
Dan Genoter	31	37.5	48	40	39	39	23	0	249.5 Reg 8 OT	$31.29 Reg. 42.58 OT	$7,806.86 $340.64
Jason Butts	15	36	32	32	23	23	15	0	176	$23.80	$4,188.80
Matt Raza **	0	36	32	32	31	31	0	0	162	$31.29	$5,068.98
Kevin Powers	0	0	40	32	0	0	0	0	72	$31.29	$2,252.88
Joseph Conway	0	0	16	40	32	0	0	0	80	$33.83	$2,706.40
Thomas Coppola	0	0	16	40	32	0	0	0	80	$33.83	$2,706.40
Harry Auch	0	0	0	0	28	18	10	0	56	$33.83	$1,894.48
George Stanichuck	0	0	0	0	26	20	10	0	56	$33.83	$1,894.48
Dan Stanichuck	0	0	0	0	26	12	6	0	44	$33.83	$1,488.52
Rodney Renaud	0	0	0	0	14	0	6	0	20	$33.83	$676.60
Dave Zawodny	0	0	0	0	26	20	10	0	56	$33.83	$1,894.48
Joseph Bulla								8	8	$33.83	$270.64
Joseph Recupero								24	24	$33.83	$811.92
Joseph Storella								16	16	$33.83	$541.28
Philip Vitello								40	40	$33.83	$1,353.20
											$46,744.72

*Boyd testified that he worked as a carpenter the first two weeks he worked at Highland Gardens and as a plaster thereafter (TR 1478). However, it does not appear that plastering began until the week ending January 14, 1994. Accordingly, I find he was a carpenter through December 31, 1993, and a plasterer beginning the week ending January 28, 1994.

**Raza testified that he was a laborer the first two weeks he worked, and a carpenter thereafter (TR 1508-09) . Since he was paid as a laborer in the weeks ending December 24 and December 31, 1993, his work in 1994 would have been carpentry work.

This total of $46,744.72 does not include back wages for Dinsmore. It is ironic – even ridiculous – that Dinsmore is eligible for back wages from RHD. For there is no doubt that H&D's subcontract with RHD was a legitimate, arms-length transaction; he was responsible for all of the underpayments of wages to his workers by seriously under-bidding and then defaulting on the subcontract; and he is one of the least credible people I have encountered in quite a while. Yet DOL inexplicably chose not to include H&D and Dinsmore as respondents in this case, and since Dinsmore was a worker as well as a supervisor on the job, he doubtless is entitled to be paid for the work he performed which is covered by the Act, *i.e.*, the hours in which he was not engaged in supervisory activities. These back wages are the responsibility of the prime contractor, RHD, since they were not paid by the subcontractor, even though Dinsmore himself is the subcontractor.

The difficulty is establishing the amount of back wages to which Dinsmore is entitled is that, aside from his own self-serving testimony that he spent 90% of his time actually working with tools (TR 1435-36), there is no other evidence in the record directed specifically to this question. However, when other workers discuss Dinsmore, they invariably mention his supervisory activities, not his work with tools (TR 1481, 1499, 1570-71, 1625). Although Dinsmore clearly performed non-supervisory work, the evidence fails to establish even a reasonable estimate of the breakdown of his work day into supervisory and non-supervisory roles. Unfortunately, neither party addressed this issue in their briefs. A further complication is that Dinsmore also worked plowing snow during the period he was at Highland Gardens (TR 1418-19; 1492), and it is unclear whether he sometimes left work early or arrived late so he could

plow. Since Dinsmore did not keep records of his own work hours, about all there is to go on is his testimony that he was on the job site whenever his workers were on the job site.

The Secretary's simplistic approach to this issue is to contend that Dinsmore is entitled to back wages for all of the hours he worked at Highland Gardens less the remainder of the payments received from RHD ($2986) which he did not pay to his workers. To calculate the hours he worked at Highland Gardens, the Secretary credited Dinsmore with as many hours as the individual worker with the greatest number of work hours each week. Using this approach, the Secretary calculated that Dinsmore worked a total of 293.5 hours through February 4, 1994. (*see Secretary's Brief*, Appendix A at 25). There is no explanation for why the Secretary stopped calculating Dinsmore's hours on February 4, since his workers were at Highland Gardens through February 9, 1994. On that basis, the Secretary should have added another 24 hours to Dinsmore's total, adding up to 317.5 hours.

I do not accept this approach. First, I see no basis to find that Dinsmore worked longer hours that the worker who worked the most hours, Dan Genoter. Genoter worked 308 hours between December 14, 1993 and February 9, 1994 (*see* GX 21 and the chart above). Accordingly, I find that Dinsmore was on the job site for a total of 308 hours. Second, the record does not support a determination that all of Dinsmore's hours were spent as a worker and thus are subject to the Act's wage determination, rather than as a supervisor, which are not covered. Based on the record before me, it appears that the most rational approach is to divide his hours in half – 50% supervisory vs. 50% non-supervisory. Accordingly, he is entitled to wages at the prevailing rate for 154 hours. Finally, I do agree with the Secretary that he should be paid as a carpenter, for all the evidence regarding his work with tools indicates that he was doing carpentry, not plastering. That rate is $31.29 an hour.

Therefore, Dinsmore should have been paid at the wage determination rate for a carpenter --$31.29 an hour -- for 154 hours, for a total of $4,818.66. He was paid $2,986. Accordingly, he is owed $1,832.66 in back wages under the Act.

In sum, RHD must pay $48,577.38 in back wages to H&D's workers. Of this total, $48,236.74 are regular wages which fall under the Act, and $340.64 are overtime wages under CWHSSA.

(b) Testa's Crew

When the work at Curwin Circle was winding down, Testa arranged with Nogueira for his crew to do some small jobs at Highland Gardens. Testa, as Testa Construction, entered into a contract on January 3, 1994 to perform this work for a total of $2900 (RX 56; TR 2333-38). Most of the work under that contract was performed (TR 2340; RX 56), and Testa was paid two-thirds of the contract price ($1950 -- RX 57-58), when a dispute arose about the installation of safety rails, one of the jobs the crew was supposed to perform under the contract. Shortly

thereafter, Testa and his crew were fired (TR 2340-41).

The Secretary is contending that Testa and each of his crew members -- Croce, Harmen and Ulrich -- are owed back wages for all of their work at Highland Gardens during this short period, alleging that they did not get paid for this work. The Secretary further contends that Testa's crew worked 9 1/2 hours a day for five days, and at the carpenter's rate at Highland Gardens ($31.29 an hour) are each owed $1486.28 plus additional back wages under CWHSSA.

First, although RHD paid Testa $1950 for the work performed by his crew, the Secretary's back wage calculations blithely ignore this fact. I accept Harmen's and Croce's testimony that they did not receive any of this money from Testa, and presume that he did not share it with Ulrich either. But since Testa was paid $1950, how can the Secretary allege that he is entitled to $1486.28 in back wages for this work? Rather, he is not entitled to back wages. Second, I have previously found that the work day at Highland Gardens was eight hours, not 9 1/2, and that no overtime was worked except for a handful of Saturdays not applicable to this period. Third, without discussion, the Secretary concludes that each of the crew members worked on this project for five days. But the evidence on the number of days worked by Testa's crew is uncertain and conflicting, and it is disingenuous for the Secretary to seek five days of back pay without at least acknowledging the uncertainty of the evidence. Harmen testified that they worked under this arrangement at Highland Gardens for four or five days (TR 982-83); Croce's testimony is all over the place (TR 816-19); and Nogueira's testimony (TR 2333-45), although also not a model of specificity, in conjunction with the documentary evidence (RX 56-58) indicates that no more than four days were worked there, since the contract was not issued until Monday, January 3, and Testa was paid for most of the work on Friday, January 7.

Therefore, I find that Testa's crew worked at Highland Gardens for four days. Eight hours a day for four days at $31.29 an hour equals $1001.28. Croce, Harmen and Ulrich are each entitled to back wages in this amount. Testa, who effectively (although unintentionally) was paid $1950 for this work, was overpaid $948.72. This sum will be used to offset any other back wages found to be due to Testa for work at Highland Gardens.

(iii) Janvrin's Crew

David Janvrin got involved in the Curwin Circle project by answering an advertisement for siders in a local newspaper (TR 484). He entered into an arrangement with Nogueira in which he would be paid $30 per square as a subcontractor solely for applying siding (TR 485, 488-89). He did not enter into a written contract. His crew included his brother, Scott, as well as Leroy and Douglas Fowler (TR 489-90).

Janvrin's crew worked at Curwin Circle in this subcontractual relationship for only seven days, September 15-17 and 20-23, 1993 (RX 116-17; TR 486, 492-93). At that time, Janvrin realized he could not make any money at only $30 a square, and he and his crew quit (TR 500). Under the terms of his agreement with Nogueira, he was paid $2010 for the 67 squares his crew

completed (RX 120). Of this amount, he paid $400 to Douglas Fowler, and $500 each to Leroy Fowler and Scott Janvrin, leaving him with $610 (TR 499-500).

Under the Curwin Circle contract, carpenters must be paid $26.82 an hour. Janvrin testified that of the seven days he and his crew worked at Curwin Circle, they worked until 1:00 p.m. on one day due to rain, and the other six days were full days (TR 495).[24] This is not quite accurate. For the clerk of the works' reports note that, in addition to leaving early on one day -- September 17 -- due to rain (RX 116, report 39), Janvrin's crew left the site at noon on September 22 for reasons apparently unrelated to the weather (RX 117, report 42). Accordingly, I find that each of Janvrin's crew members worked eight hours on September 15, 16, 20, 21, and 23; five hours on September 17; and 4.5 hours on September 22, for a total of 49.5 hours, for which they should have been paid $1327.59. Thus the following back wages are owed under the Act: David Janvrin -- $717.59; Scott Janvrin and Leroy Fowler -- $827.59 each; and Douglas Fowler -- $927.59.

(iv) Barbara Baker

The Secretary contends that Barbara Baker worked as a painter at Curwin Circle for 35 eight-hour days (280 hours) starting in the second week of October and ending approximately on December 17, 1993 (*Secretary's Brief*, Appendix A at 1). At the painter's rate of $31.77 an hour, she should have earned $8895.60. Noting that she had been paid $5419.08 by RHD, and considering Barbara Baker's testimony that she was paid $15 an hour to paint the dormers, the Secretary determined that $4200 of the $5419.08 went to the work she performed on site at Curwin Circle (280 hours at $15 an hour) and the rest was for work performed at RHD's office . Accordingly, the Secretary contends that Barbara Baker was underpaid $4695.60 for painting at Curwin Circle.

Nogueira agrees, with some exceptions, that Barbara Baker was paid $15 an hour to paint canopies, but insists, also with some exceptions, that this work took place at his office in Tewksbury or at her home, not at the Curwin Circle site. He argues, and the Secretary apparently agrees, that the wage determination rates do not apply at either location.

Determining whether Barbara Baker is entitled to back wages is perhaps the most difficult aspect of this case. For one thing, the evidence regarding the number of hours Barbara Baker spent painting at Curwin Circle is conflicting, confusing and uncertain. What appears to be clear is that Mrs. Baker painted canopies that were to be installed at Curwin Circle, for which she was to be paid $15 an hour. A substantial portion of this work took place either at RHD's office in Tewksbury or at Mrs. Baker's residence in New Hampshire (TR 208-12). Also, it is known that RHD paid Mrs. Baker $5419.08 which is represented in two Form 1099's (*see* TR 218;

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[24]Actually, Janvrin testified that most of the work days were about 9 to 9 1/2 hours long. I have previously rejected the fact that overtime was the routine at Curwin Circle.

Secretary's Brief, Appendix A at 1), as well as a payment of $321.57, which presumably represents two days pay at the painter's rate of $31.77 (*see* RX 136; TR 182, 220). Thus, she was paid a total of $5740.65 to paint canopies for RHD. But the questions remain, how much of this sum was for painting at Curwin Circle, and how many hours did Barbara Baker paint at Curwin Circle?

Nogueira's testimony regarding when Mrs. Baker worked on site was inconsistent, causing him at one point to admit "I'm confused with the Barbara Baker issue to say the least." (TR 2477) Barbara Baker's testimony concerning this issue was even more inconsistent and less credible. She did not mention any off-site painting in her direct testimony, but she admitted on cross-examination that much of the painting she did occurred either at RHD's office or at home (TR 208, 212). In fact, she may have done more painting offsite than at Curwin Circle. Moreover, much of the specifics of her testimony were wrong. For example, she testified that she was laid off from her seasonal job at the Internal Revenue Service in mid-September, 1993 (TR 205), and started working at Curwin Circle in the second week of October (TR 180, 187). The Secretary has adopted this position.[25] But in actuality, it appears that she started working at Curwin Circle even earlier, on September 29th. For the clerk of the works' report for that date notes that a painter was painting canopy brackets.[26] The clerk, James Walsh, testified that Barbara Baker was the only painter on site (TR 1991). This is consistent with Nogueira's testimony that Mrs. Baker started before the R&B workers became RHD employees (TR 2478). Accordingly, I find that Barbara Baker started working at Curwin Circle on September 29, 1993. She also testified that she stopped working about December 17, or in the second or third week of December (TR 181). In fact, her last day of work at Curwin Circle was Monday, December 13, and at most she worked a total of only four days in December (*see infra*).

In addition, Mrs. Baker testified that she typically worked a five-day week at Curwin Circle (TR 185). In actuality, she worked a full week only once at most, from November 15-19 (*see infra*). Further, she stated that she signed in at Curwin Circle only twice (TR 185), whereas she signed in on eight separate days (*see* RX 109).

Another problem in determining Barbara Baker's work hours at Curwin Circle is that the most reliable evidence -- the clerk of the works' reports and the sign-in sheets[27] -- seem to

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[25]She also testified that she did not start painting dormers for RHD off site until early October. TR 209.

[26]The record contains clerk's reports prepared by Jim Walsh through October 15, 1993. Walsh was injured on October 18th, and did not return to the project. There are no clerk of the works' reports from October 18 through November 8. George Jenkins took over as clerk of the works at Curwin Circle on November 9, 1993. The clerk's reports resume on that day.

[27]In regard to the sign-in sheets, although there is considerable testimony that the workers were limited to signing in for only eight hours of work, there is no evidence that they were

contradict each other on two days. The sign-in sheets in evidence begin on October 12 (RX 109). Barbara Baker did not sign in on either the 12th or the 13th, and the clerk's reports do not indicate that any painting was going on on either of those days. She did sign in on October 14th, and signed in on each subsequent day for which the record contains a sign-in sheet through October 29th, a total of eight days, at which point she says she was told not to sign in anymore (TR 186). The clerk's reports for October 14 and 15 do not list any painters at Curwin Circle, whereas Mrs. Baker signed in on both those days. Unless she worked in a capacity other than as a painter on those days, something which has no support in the record, there is an irreconcilable conflict between these exhibits. Since it is the employer's obligation to maintain accurate payroll records, I will resolve this conflict in favor of the worker and find that Mrs. Baker worked as a painter at Curwin Circle on both October 14 and 15.

In determining that Barbara Baker worked at Curwin Circle on 35 different days, the Secretary states that the clerk of the works' reports (RX 116-17) identify a painter working on site on 20 separate days (*Secretary's Brief*, Appendix A at 1). But one of the reports listed by the Secretary -- No. 18, for December 3 -- states "0" after painters *(see Secretary's Brief* at 28). On the other hand, the Secretary's list omitted one report which states that a painter was working -- No. 47, for September 29, 1993. Based on my my review of the clerk's reports, at least one painter or caulker-painter is listed as working at Curwin Circle on the following 20 dates: September 29; October 4 and 6-8; November 9-11, 15-19, 22, 23, and 29; and December 1, 2, 10, and 13. However, on one of those days, November 22, the clerk's report identifies a single individual as caulking and painting dormers. Since there is no indication that Barbara Baker ever did anything other than painting in connection with these canopies, it does not appear that she was the person who was painting and caulking on November 22. Further, the clerk's report for December 2 lists *two* painters working on site. Since Mrs. Baker testified that she was the only painter when she was painting (TR 186), I find that she was not painting on site on that day. That leaves 18 days for which the clerks' reports note RHD had a painter on site where Mrs. Baker may have been that painter. Two of these 18 days -- November 17 and 19 -- are questionable, for on these days the clerk's reports list three people under the job description "caulk-paint" rather than having caulking and painting listed separately. Since Mrs. Baker did not caulk, it is far from clear that she worked on either of those two days. However, I will assume that she was painting on those days, and two other workers were doing the caulking.

In addition to these 18 days reflected on the clerks' reports, the Secretary assumed that Barbara Baker worked at Curwin Circle every day for which a clerk's report is not in the record, contending that this amounted to an additional *15* days. In fact, the period from October 18 through November 8, 1993 for which there are no clerk's reports actually includes *16* work days. But Mrs. Baker did not work at Curwin Circle every day for which a clerk's report is unavailable. At the least, she did not work there on October 21, 22 or 27, for no siding work occurred at Curwin Circle on these days. The Curwin Circle payrolls indicate that all of RHD's employees were working at another site (presumably Highland Gardens) on those days (*see* GX 17; *see* also

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otherwise inaccurate.

GX 20, payroll for week ending October 30, 1993). Consistent with this conclusion is that there are no sign-in sheets for Curwin Circle for any of these days (*see* TR 109). Further, there is no reason to presume she worked all of the other days for which a clerk's report is unavailable and for which there are no sign-in sheets, since she did not work every day for which the reports are available. In fact, the only time she may have worked a five-day week was from November 15 through 19.

I find that, in addition to the 18 days listed above, Mrs. Baker worked at Curwin Circle on the eight days where she is listed on the sign-in sheets: October 14, 15, 19, 20, 25, 26, 28 and 29. Finally, the dates for which neither sign-in sheets nor clerk's reports are available and on which, according to the payrolls, work was performed at Curwin Circle are October 18, November 1-5 and November 8, a total of seven days. Based on her overall work record, which indicates that she worked 3-4 days a week, it is reasonable to find that Barbara Baker worked on five of those seven days.

Accordingly, I find that Barbara Baker worked as a painter at Curwin Circle on 18 days listed on the reports of the clerks of the works; eight days in which she appears on the Curwin Circle sign-in sheets; and five days for which neither sign-in sheets nor clerks' reports are available; for a total of 31 days.

Next, the Secretary's assumption that Barbara Baker worked a full eight hour day each day she worked at Curwin Circle (*Secretary's Brief*, Appendix A at 1) is unfounded. Actually, she may never have worked an eight-hour day. Although acknowledging in her brief that Mrs. Baker testified that her work days ranged from four to eight hours (TR 184) (*Secretary's Brief* at 27), this testimony was ignored by the Secretary in the back wage calculations.[28] Further, according to the clerk's report, she only worked for one hour on October 4, worked a partial day on October 8, and on at least two days (November 17 and 19) the clerk's report states that all work ceased at 2:00 p.m. or 2:15 p.m. What is more, she did not work more than seven hours on any of the eight days for which sign-in sheets are in evidence (*see* RX 109). The earliest she arrived at the worksite was 8:00 a.m., and the latest she stayed was 3:30 p.m. This is consistent with Mrs. Baker's testimony that she worked a shorter work day than any of the other workers, because she had to get home to take care of her children (TR 183). Allowing a half hour for lunch, her average work day reflected on those eight sign-in sheets was 5.25 hours; there is no reason to believe this was not her average work day throughout the time she worked at Curwin Circle.

For the foregoing reasons, the Secretary's back wage calculations for Barbara Baker are essentially worthless. At best, she worked as a painter for an average of 5.25 hours on 30 days,

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[28]In fact, in the Appendix to her brief the Secretary miscites the record, at TR 184-85, in stating that "Barbara Baker testified that she worked no more than an eight-hour day." (*See Secretary's Brief*, Appendix A at 1). Her testimony was that she worked "between four and eight" hours a day (TR 184 at lines 23-24), which is substantially different.

and one hour on another. Assuming she worked all of this time, she should have been paid $5035.55 (158.5 hours at $31.77 an hour). The Secretary concedes that she was paid $5419.08 by RHD, which was documented on two Form 1099's; and Mrs. Baker testified that she received an additional sum of between $300 and $400 for her first two days of work at Curwin Circle (TR 182, 220). In fact, she was paid $321.57 for those two days (RX 136). Therefore, she was paid a total of $5740.65 in wages by RHD.

Under these circumstances, it would not be unreasonable to find that Mrs. Baker is not entitled to back wages. Not only did RHD pay her more than she is entitled to for the work she did at Curwin Circle, but she testified that the earnings reflected on the Form 1099's were for work at Curwin Circle (TR 186). Moreover, her testimony regarding the work she did for RHD lacked specificity; the documentary evidence, while helpful, is incomplete and occasionally inconsistent; and she is not a credible witness in any event due both to her inherent lack of credibility (*see supra*) and the general inaccuracy of her testimony. Nevertheless, it was respondents' burden to prepare accurate payrolls, and in the case of Barbara Baker they ignored this responsibility. Accordingly, if a reasonable way exists to determine if she is entitled to back wages and to calculate such back wages, then they must be awarded. *See, e.g., Anderson v. Mt. Clemens Pottery Co., supra*.

The Secretary calculated the back wages due to Barbara Baker by determining the difference between the amount of money Mrs. Baker should have been paid by RHD at prevailing wage rates and the amount of money she would have earned had she been paid $321.57 for two days at Curwin Circle and $15 an hour thereafter, as Mrs. Baker testified she was paid and Nogueira more or less confirmed. Based on my finding that she worked a total of 158.5 hours over 31 days at Curwin Circle, Mrs. Baker should have been paid $5035.55 at prevailing wage rates; at the rates she was paid, according to the less ambiguous testimony, she would have received $2541.57. Subtracting $2541.57 from $5035.55 produces an underpayment of $2493.98.

The problem with this calculation is that it leaves too much money unaccounted for. As noted, the evidence establishes that Mrs. Baker was paid $5740.65 for work between September 29 and December 13. There were only 51 business days (including Veteran's Day, since it seems to have been treated as a normal work day for RHD, but excluding Columbus Day, Thanksgiving and the day after Thanksgiving, since those were days off at RHD) in that period. Subtracting the $321.57 which she was paid for two of those days, that leaves $5419.08 as her wages for the remaining 49 business days. At $15 an hour, Mrs. Baker would have had to work over 361 hours to have earned that much money. I have already found that she worked a total of 148 hours on the remaining 29 days she worked at Curwin Circle. That leaves over 213 hours to account for in only 20 business days. That she may have worked so many hours off-site ranges from highly unlikely to impossible. For at 5.25 hours worked per day, this would have entailed more than 40 days of work. Even assuming she worked eight-hour days off-site she still would have had to put in almost 27 additional days to have worked 213 hours. Accordingly, the numbers do not add up. Either Mrs. Baker was paid at a higher hourly rate for her work than the testimony indicates or

she was paid substantially less money than she testified she received. Since she testified that she reported the $5500 reflected on the Form 1099's on her income tax returns,[29] and further admitted receiving the separate check for $321.57, she must have been paid all the money she testified she received from RHD. So the other option -- that she was paid at a higher rate of pay than $15 an hour -- must be correct.[30]

There is some testimony which suggests that Mrs. Baker may have been paid at a higher rate of pay for some of her work at Curwin Circle -- Nogueira's somewhat confused testimony that Mrs. Baker was paid differently for the days where she was listed on the sign-in sheets (TR 2477-78; *cf*. TR 2267-68). It is possible that Mrs. Baker was paid at the wage determination rate for painters -- $31.77 -- for all of her hours which are listed on the sign-in sheets, a total of 42 hours, since the other workers listed on the sign-in sheets were paid at their prevailing wage rates. That would certainly explain why she was instructed to stop signing in. If Mrs. Baker had been paid $31.77 an hour rather than $15 for those 42 hours, she would have been paid an additional $704.34, reducing the deficiency between what she was paid and what she should have been paid to $1789.64. Under this scenario, the rest of the numbers would come closer to being reconciled. As was stated above, Mrs. Baker was paid $5419.08 for 49 days of work. If it is assumed that she was paid at a rate of $31.77 an hour for 42 hours of work on eight of those days, a total of $1334.34, that would leave $4084.74 earned over 41 days. For the remaining 21 days at Curwin Circle, Mrs Baker worked an hour one day and averaged 5.25 hours on the other 20. At $15 an hour, this would total $1590.00. That leaves $2494.74 to have been earned in 20 work days. At $15 an hour, it would take 166 hours of work to earn $2494.74. Working 5.25 hours a day, it would take 31.7 days to work 166 hours; but working eight hours a day, it would take only 20.8 days to work 166 hours. Although there is no reason to believe Mrs. Baker actually worked off-site painting dormers for eight hours each business day that she was not working on site between September 29 and December 13, at least it is possible. Accordingly, I find that Mrs. Baker was paid at the wage determination rate for the 42 hours covered on the sign-in sheets, and therefore was paid a total of $3245.91 for her work at Curwin Circle. Since she should have been paid $5035.55 for this work, she was underpaid $1789.64. That is the amount of back wages she is due.

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[29]This figure got rounded off to $5000 in her testimony about her taxes. *See* TR 222.

[30]I have ruled out two other possibilities -- that Mrs. Baker started painting for RHD before September 29 and/or stopped working after December 13, or that she worked on weekends. In regard to her starting and ending dates, I have already found that she started working for RHD a week or two earlier than she said she did. That her ending date was later than December 13 is even less likely. For she did not work at Curwin Circle after December 13, and by that time all of the dormers should have been on the site, eliminating any need for her to work off-site. As for working on weekends, there is no evidence in the record even suggesting that she painted off-site on Saturdays or Sundays.

(v) Proia and Jurczak[31]

The Secretary contends that Jeffrey Proia and Mark Jurczak were not paid at the proper wage determination rates for their work at Curwin Circle and/or Highland Gardens. There is virtually no discussion of this issue in the *Statement of the Facts* in the *Secretary's Brief*. However, in Appendix A, the back wage calculations section of the brief, the Secretary alleges that: Proia was underpaid, and not reimbursed, $3.25 an hour for a total of 48 hours for the weeks ending October 2 and October 9, 1993[32] at Curwin Circle; Proia was underpaid $3.75 an hour for a total of 32 hours for the weeks ending October 2 and October 9 at Highland Gardens, and an additional $.40 an hour for an unspecified period where he was paid $23.40 an hour instead of $23.80; and Jurczak was underpaid $.40 an hour for 126 hours for which he was paid $23.40 instead of $23.80, totalling $50.40. The wage determination rate for laborers at Curwin Circle was $23.30; it was $23.80 at Highland Gardens.

I will start with Jurczak, for his situation is simpler. Jurczak worked only at Highland Gardens (TR 1254). He started there in the week ending October 9, 1993 (TR 1255; GX 35). He worked 24 hours that week, for which he was paid $20.05 an hour; he received a supplemental check for an additional $3.35 an hour a week later, bringing him up to $23.40 an hour . He then worked 40 hour weeks the next two weeks, for which he was paid $23.40 an hour (GX 35). He then hurt his foot, and apparently was off work due to this injury for the entire work week ending October 30, since he is not listed on the Highland Gardens payroll for that week, and there also is no payroll stub for him for that week (TR 1268; GX 20, 35). He returned to work on Monday, November 1, and was fired at the end of the work day (GX 20; TR 1268). He was paid at the rate of $23.40 an hour for November 1st (GX 20).

Jurczak worked a total of 112 hours at Highland Gardens.[33] He was underpaid $.40 an hour for all of the hours he worked. Accordingly, he is owed an additional $44.80 in back wages.

Proia's back wage calculations are more complicated, for two reasons. First, he worked at both Curwin Circle and Highland Gardens, sometimes during the same work weeks. In addition, although he sometimes was underpaid, at other times he was overpaid. Inexplicably, the Secretary's back wage calculations fail to identify the days on which she contends Proia worked at each project, information which is vital in determining the amount of back wages, if any, to

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[31]This section does not include underpayments for work on some Saturdays, which was discussed earlier in this decision.

[32]He was reimbursed for the 24 hours he was underpaid for the pay period ending September 25, 1993 (*see* GX 34). He was reimbursed an extra $3.35 an hour instead of $3.25 an hour, an overpayment of $2.40.

[33]The Secretary credited him with an additional 14 overtime hours which I find were never worked.

which Proia is entitled. Since it must be assumed that counsel had this information before them in making their back wage calculations, it is unfathomable that they did not include it in their brief.

Proia worked for RHD beginning on September 22, 1993, and worked through the week ending December 18, 1993, when he was laid off (TR 1124, 1184; GX 17). He started at Curwin Circle, and testified that he moved to Highland Gardens on a steady basis; however, he stated that he "jumped back and forth" between projects (TR 1124). But his testimony about when he moved to Highland Gardens is inconsistent. He testified first that he moved there on October 18 (TR 1124), then said the move occurred by the end of October or the beginning of November (TR 1192-93, 1206), then stated that he was at Highland Gardens the week ending October 23, but was at Curwin Circle the following week (TR 1199-1200). The record contains documentary evidence of his employment with RHD in the form of the certified payrolls for both projects (GX 17, GX 20), weekly pay stubs for each week other than the week ending October 2 (GX 34), which is missing,[34] and sign-in sheets for Curwin Circle beginning on October 12, 1993 (RX 109-10). Unfortunately, the payrolls and the pay stubs are not always consistent with each other. For example, the payrolls for Curwin Circle indicate that supplemental payments of $3.75 an hour for all hours worked were made to Proia for the weeks ending September 25 and October 2, whereas the corresponding pay stub states that he was paid an additional $3.35 an hour.
Where there is a conflict between the pay stubs and the certified payrolls, I credit the pay stubs, since they should be prepared concurrently with, and based on, the paychecks. For other weeks, he is listed on the payroll but there is no corresponding pay stub, or vice versa. Moreover, the payrolls are sometimes internally inconsistent. For example, the payroll for November 6 lists Proia's rate of pay at $17.20 plus $6.20 in fringe benefits, for a total hourly wage of $23.40. But his gross pay of $952 for that pay period equals $23.80 an hour, and that is the wage reflected on the corresponding pay stub. Further complicating the situation is the fact that, although Proia testified that he worked primarily at Highland Gardens after October 18, and exclusively so after the first week of November (TR 1124), from the week ending November 6 through the end of his employment at RHD he is listed, with the exception of a single day, solely on the Curwin Circle payrolls,[35] although usually at the Highland Gardens wage rate. Moreover, he signed in and out on the Curwin Circle sign-in sheets on every work day beginning on November 1 and going through December 16, with the exceptions of December 2, when he is listed on the Highland Gardens payroll, and December 9, when it appears he did not work at either site (RX 109-10).

First, it must be concluded that Proia's memory is very unreliable. Although he is correct regarding the dates he began and ended his employment with RHD, his testimony concerning

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[34]It should be noted that the payrolls use Saturday as the "week ending" date, whereas the pay stubs use Sunday and thus are dated a day later. For the sake of convenience, this decision will use the Saturday of the week as the "week ending" day regardless of whether it refers to the payrolls or the pay stubs.

[35]He is not listed on either payroll for the week ending November 20, although a pay stub for this period is in evidence.

whether he was working at Curwin Circle or Highland Gardens is far off the mark. The sign-in sheets seem to be the best evidence of where he worked on any given day beginning on October 12, 1993, the first day for which they are available. Proia did not sign in at Curwin Circle until November 1st, and from that day forward he signed in there every day he worked through December 16 except for December 2, when the payrolls indicate he worked at Highland Gardens. Accordingly, I find that all of his work for RHD from November 1 through December 16, with the single exception of December 2, occurred at Curwin Circle. Further, I find that he moved from Curwin Circle to Highland Gardens on Wednesday, October 6, in accordance with the Curwin Circle payroll for the week ending October 9, which states that Proia worked at Curwin Circle on October 4 and 5, and worked "at another jobsite" on October 6-8. Since Proia does not appear either on the Curwin Circle payrolls or sign-in sheets for the weeks ending October 16 and October 23, but was paid for 40 hours each of these weeks, it is reasonable to conclude he was working at Highland Gardens both those weeks. Moreover, he is listed as working 40 hours on the first Highland Gardens payroll, which is for the week ending October 30. Finally, it is possible that he worked at Highland Gardens on October 1, 1993, based on the way the eight hours he worked that day is entered on the Curwin Circle payroll, but that is just speculation on my part which cannot sustain a finding to that effect.

Accordingly, I find that Proia worked the following hours at the stated rate of pay, and was overpaid or underpaid based on the laborer's wage determination rate of $23.30 at Curwin Circle and $23.80 at Highland Gardens:

	Curwin Circle			Highland Gardens		
Week Ending	Hours	Wage Rate Paid	Overpayment (Underpayment)	Hours	Wage	Overpayment (Underpayment)
9-25-93	24	$23.40	$2.40			

10-2-93	40	$23.40[36]	$4.00			
10-9-93	16	$20.05	($52.00)	24	$20.05	($90.00)
10-16-93				40	$23.40	($16.00)
10-23-93				40	$23.40	($16.00)
10-30-93				40	$23.40	($16.00)
11-6-93	40	$23.80[37]	$20.00			
11-13-93	33.5	$23.40[38]	$3.35			
11-20-93	38	$23.80	$19.00			
11-27-93	24	$23.80	$12.00			
12-4-93	32	$23.80	$16.00	8	$23.40	($3.20)
12-11-93	32	$23.80	$16.00			
12-18-93	25	$23.80	$12.50			
Total Overpayment (Underpayment)			$105.25 ($52)			($141.20)

[36]Proia's weekly pay stub for this week is missing. RHD's payroll for this period indicates he was first paid $20.05 an hour, and a supplemental payroll states he was paid an additional $3.75 an hour. A similar supplemental payroll at $3.75 an hour was prepared for the previous week, but the pay stub indicates that the supplemental pay was at the rate of $3.35 an hour rather than $3.75. Crediting the pay stub over the payroll, I find that the supplemental pay for the week ending September 25 was at the rate of $3.35 an hour. I further assume that Proia received a supplemental check based on $3.35 an hour for the week ending October 2, 1993.

[37]As indicated in the previous footnote, I give greater weight to the pay stubs than to the wage rate listed on the payrolls.

[38]There is no pay stub in the record for this pay period, so I must rely on the payroll.

When the overpayments and underpayments are factored in, Proia was slightly overpaid for his work at Curwin Circle, and was underpaid $141.20 at Highland Gardens. Thus, he is owed an additional $141.20 in back wages under the Highland Gardens contract.

3. Record Keeping Violations

The Secretary alleges that RHD violated the DBA record keeping provisions by doing the following:

1. Recording employees' hours and dates of work performed at one project on the payroll records of another project;

2. Falsifying certified payrolls for Curwin Circle and Highland Gardens by showing that its employees worked fewer hours than were actually worked;

3. Omitting workers from the Curwin Circle and Highland Gardens certified payrolls; and

4. Instructing, assisting and encouraging its alleged subcontractors to falsify the certified payrolls.

The Secretary did not further explain the first contention in her brief, but I assume she is referring to RHD's practice of including hours worked at Highland Gardens on the Curwin Circle payrolls through the pay period ending on October 23, 1993, at which time RHD starting maintaining separate certified payrolls for Highland Gardens. RHD clearly engaged in this practice, as can be seen on the payrolls for pay periods ending October 9, October 16 and October 23 (GX 17). Thereafter, both the Curwin Circle and Highland Gardens payrolls, although breaking down the hours worked at each project, listed the total pay a worker received from both projects on each payroll.

The second charge listed above relates to two separate practices. First, the Secretary is alleging that the certified payrolls prepared by RHD for both projects listed no more than eight hours of work a day for each employee. This allegation is premised on finding that RHD's workers worked a routine 9 to 9 1/2 hour day. Since I found that the workers routinely worked only an eight-hour day, this contention is baseless. Second, the Saturday hours worked by several employees are not listed on the payrolls. This is a clear violation of the record keeping provisions.

The third contention, which was not addressed further in the *Secretary's Brief*, appears to relate primarily to the failure to list Barbara Baker on the payrolls. Since Barbara Baker worked a substantial number of days at Curwin Circle, and she is not listed on any of the Curwin Circle payrolls, the Secretary has proven this allegation. In addition, respondents failed to maintain any payroll records for David Janvrin's crew for the seven days they worked at Curwin Circle in late September. Since I find that Janvrin's workers were RHD employees rather than the employees

of a subcontractor (*see infra*), it was RHD's responsibility to include this crew on its Curwin Circle payrolls. But David Janvrin and his brother Scott do not appear on RHD's Curwin Circle payrolls until the week ending October 9, and the other two crew members -- Leroy and Douglas Fowler -- do not appear on RHD's payrolls at all. The Janvrins and Leroy Fowler do appear on some of R&B's payrolls, but they never worked for R&B. Moreover, some of the listings are for periods when none of them were working at Curwin Circle. Respondents violated the record keeping provisions of the DBA by failing to list Barbara Baker on RHD's payrolls and failing to maintain payrolls for David Janvrin's crew in September, 1993.

The last contention regarding record keeping, one which I have previously rejected, is that RHD's bookkeeper, Annette Smith, assisted Baker Builders in falsifying its payrolls.

Although not specifically listed by the Secretary as separate record keeping violations of the DBA, respondents also violated these provisions in two other important respects. First, respondents did not comply with §5.5(a)(6) of the regulations by inserting all of the required provisions contained in §5.5(a) in its subcontracts. These provisions set out the requirements of the DBA as they apply to contractors and subcontractors. Second, respondents did not comply with §5.5(a)(3)(ii)(A) by making sure its subcontractors submitted their payrolls.

Accordingly, RHD has violated the record keeping requirements of the DBA in several important respects.

4. Use of Subcontractors

The final contentions of the Secretary concern subcontractors or alleged subcontractors. First, it is contended that Nogueira "coerced" individuals to work as subcontractors and then did not pay them the applicable prevailing wage. Second it is asserted that "Nogueira personally participated in arranging, contracting and utilizing alleged 'subcontractors' with the intended purpose of evading the prevailing wage requirements of the DBRA." *Secretary's Brief*, at 40.

In regard to the "coercion" allegation, I find that no one was coerced by Nogueira into working as a bona fide or purported subcontractor. According to my dictionary, "coerce" is defined as:

> 1. To force to act or think in a given manner by pressure, threats, or intimidation; compel. 2. To dominate, restrain, or control forcibly .... 3. To bring about by force ....

American Heritage Dictionary at 288 (2d ed. 1982). Informing someone that you will employ them only if they will enter into a subcontractual relationship does not rise to the level of threats or force contemplated by the word "coerce." The DBA does not require an employer to hire any particular people; rather, it requires an employer to pay the people it does hire at or above set wage rates. I find nothing illegal in RHD insisting that it wanted to subcontract out all of the

work at its projects, or in setting the amount of the subcontracts. Had the Secretary established that the payments due to the subcontractors were so low that Nogueira had to have known that the subcontractors' workers could not be paid at prevailing wage levels, that would be another ball game. But the Secretary has not made this showing.

In regard to whether RHD and Nogueira utilized the services of subcontractors to avoid paying wage determination rates, RHD utilized the services of R&B Carpentry, Baker Builders, H&D Drywall, Janvrin Construction, Testa Construction and Donald Overka, along with many other subcontractors whose practices are not at issue here, at Curwin Circle and Highland Gardens. Although some of these relationships clearly were bona fide subcontracts, and others may not have been, that is not important. What is important is whether RHD and Nogueira used these relationships for the purpose of evading the prevailing wage requirements. Thus the question is not whether the work crews of these subcontractors ultimately wound up getting paid less than the prevailing wage, but whether this was the intent of RHD and Nogueira when the relationships were entered into. The Secretary has failed to meet her burden of proof on this issue.

Taking the easiest case first, RHD's subcontract with H&D Drywall was bona fide. Nogueira did not know Eric Dinsmore prior to his becoming a subcontractor at Highland Gardens, and there is no evidence whatsoever that their arrangement was not a true arms-length transaction. Further, Dinsmore admitted that the problems under the subcontract were his own doing because he seriously underbid it. No evidence was offered to indicate that Nogueira even suspected that the subcontract was underbid or that Dinsmore would not be able to pay his workers at the wage determination rate under the contract price.

Concerning Testa and Testa Construction, although his subcontract was arranged quickly, and involved only a short period of work, I find it was a bona fide subcontract. Testa informed Nogueira that he had an ongoing business called Testa Construction (TR 2336); Testa initiated the arrangement; a purchase order was prepared; and payments were made pursuant to the purchase order. That Testa failed to pass on to his workers the money paid to him under the subcontract by RHD, or that Testa then defaulted on the subcontract, precluding him from collecting the remainder of the contract payments, is not the fault of RHD.

Concerning R&B Carpentry, I find that this was intended by the parties to be a real subcontractual arrangement. Although Nogueira knew both Tumenas and Ron Baker, that by itself does not mean the the subcontract was not bona fide. The parties entered into a contract (RX 85), and payments were made pursuant to the contract (RX 86-88). Further, Nogueira testified that he informed the Lynn Housing Authority that R&B was to be a major subcontractor (TR 2197), and RX 82 and 83 were prepared in response to requests from the Housing Authority regarding R&B's ability to do the job (TR 2196-99). Ron Baker knew it was a prevailing wage contract although he, like Nogueira, believed that principals of the subcontractor did not have to

receive the prevailing wage (TR 363-65).[39] He also was told by Nogueira that he was required to prepare certified payrolls (TR 289). That the contract may not have worked out to the parties' satisfaction, leading them to change their relationship, does not alter the fact that this was a bona fide subcontract. Moreover, the Secretary had not presented any evidence that there was an intention on Nogueira's part to evade the prevailing wage requirements through the subcontract with R&B. That Nogueira paid Ronald Baker $100 a day to pay to each of his workers is not evidence to the contrary. For as was previously noted, the Secretary acknowledges that these payments were interim payments until R&B completed some buildings and thus was entitled to receive payments at the rate of $60 per square under the contract. And subsequently, as R&B completed buildings, it was paid the balance over and above the $100 per day per worker that was due at the $60 per square rate (TR 262). Further, when Nogueira believed the subcontract was not working out, he made the R&B workers employees and paid them at the prevailing wage, which is further evidence that he was not seeking to evade the prevailing wage requirements through his subcontract with R&B.

In regard to Baker Builders, the record has failed to establish that the payrolls it submitted, which reflect the wage determination rates, were false or inaccurate. As was indicated above, I do not accept Barbara and David Baker's testimony that they deliberately prepared false payrolls.

Donald Overka allegedly worked as a subcontractor at Highland Gardens doing the work Testa and his crew refused to do, leading to their being fired. A purchase order was prepared by Nogueira stating the jobs to be done and the cost for each, totalling $1000 (RX 63). Overka and Joseph Gallagher, who was listed on the certified payrolls as a co-owner and carpenter, performed the work from January 17-24, 1994 (RX 64-65). Overka sent RHD a bill for $750 when the job was completed, acknowledging that the remaining $250 would be paid when he turned in proof of his liability insurance; and the $750 was paid (*see* RX 62, 67, 68). He never sent in the proof of insurance and thus never received the remaining $250 (TR 2352). The certified payrolls filed by Overka state that he and Gallagher were paid salaries for the total of 83 hours they worked on the project. The payrolls did not list their rate of pay. Again, this is a violation of the regulations, since as working subcontractors they should have been paid at the wage determination rate.[40] But again, there was no evidence presented that Nogueira had reason to believe it would take 83 work hours to perform the jobs listed on the purchase order; nor was evidence presented that Nogueira knew that working subcontractors had to receive the prevailing wage.

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[39]Nogueira believed that working subcontractors were not covered by the wage determinations, based on his experience with the Otis ANGB contract, which was his only previous contract subject to the DBA.

[40]Interestingly, the Secretary is not seeking back wages for either Overka or Gallagher for their work at Highland Gardens despite the fact that, based on the payrolls, they were paid less than $10 an hour for their work.

Finally, it cannot be found that RHD and David Janvrin had a bona fide subcontractual relationship. Janvrin testified that he took the job for himself and three other men based on an informal arrangement with Ron Baker and Nogueira. He did not sign a contract, was not informed he would have to keep payrolls or get insurance, and apparently was not informed that it was a prevailing wage job (TR 491-92). Nevertheless, that Nogueira sought to have Janvrin work as a subcontractor rather than hire him and his crew as employees clearly is not dispositive of his intent. For there are many benefits to contracting out work rather than hiring employees, as many organizations, including the Federal Government, are discovering. Moreover, there is no evidence that Nogueira attempted to hire Janvrin as a subcontractor as a way to avoid paying the prevailing wage, although it does seem that Nogueira was indifferent to the prevailing wage requirements for his subcontractors and their workers.

Accordingly, the evidence fails to prove that Nogueira used bona fide or alleged subcontractors for the purpose of evading the prevailing wage requirements. Although he may not have taken sufficient precautions to assure that his subcontractors' workers were paid at the wage determination rates, he was not charged with being negligent in regard to this requirement; rather, he was charged with deliberate evasion. That has not been proven.

5. Respondents' contentions

Respondents raised several points in their brief, most of which have already been discussed above. However, three issues have not been addressed. It should be noted that these arguments total two double-spaced pages in respondents' brief, and no supporting statutes, regulations or case law are cited in support of any of them.

First, in early January 1994, DOL was notified by the Lynn Housing Authority that the clerk of the works' reports for Curwin Circle indicated that painting was occurring there but the certified payrolls did not list anyone getting paid at the painter's wage determination rate (*e.g.*, TR 1753). Hammond, the Wage and Hour compliance officer, brought this to Nogueira's attention, and it was agreed that back wages of $24.08 each were to be paid to 20 different workers (TR 1753-54; *see also* RX 68).[41] Ten of the workers actually cashed the checks, which were sent to them in late January to mid-February, 1994 (RX 69). Three of these 10 also signed forms acknowledging their receipt of these payments (RX 70-72).

It is respondents' position that the Secretary should be estopped from obtaining any further relief for the workers who cashed the checks. But since that investigation concerned a different allegation than those raised in the current proceeding, there appears to be no basis to bar the Secretary from proceeding with this case in regard to any of these individuals. Respondents also argue that the three people who signed forms acknowledging their receipt of the $24.08 definitely should not be eligible for further relief, noting that the forms state that:

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[41]Significantly, Barbara Baker was not one of these 20 workers.

> Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 6(b) of that Act.

But this case was not brought under the Fair Labor Standards Act; it was brought under the DBRA and CWHSSA. Moreover, this case was not initiated by the workers; it was brought by the Department of Labor. Accordingly, even if the waiver on the form acknowledging receipt of the $24.08 in back wages could be held to bar the workers from bringing further suits under the Fair Labor Standards Act, it has no applicability to this case brought by DOL under other statutes.

Second, respondents challenge the legitimacy of the wage determinations applicable to the Curwin Circle and Highland Gardens contracts. But I already ruled at the hearing that this is not the proper forum to contest the wage determinations. *See* TR 6-15.

Finally, respondents contend that they are entitled to interest on the monies withheld under the Otis ANGB contract as well as any withheld monies under the other contracts which are released to RHD as a result of this decision. As noted, respondents cite no authority of any kind in support of this argument, and it is rejected.

6. Debarment

Under §5.12(a)(1) of the regulations,

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of [the Davis-Bacon Related Acts], such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed three years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in §5.1.

The Wage Appeals Board has held that to be "willful," a violation can "encompass intentional disregard, or plain indifference to the statutory requirements of the Davis-Bacon Act." *In re L.T.G. Construction Co.*, WAB Case No. 93-15, slip op. at 7 (1994), *remanded on other grounds sub nom. Griffin v. Reich*, 954 F. Supp. 98 (D.R.I. 1997). Other cases have held that "reckless disregard" is sufficient to meet the "willful" standard. *See, e.g., In re Wayne J. Griffin Electric, Inc.*, WAB Case No. 93-05, slip op. at 5 (1993), *quoting McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

The Secretary contends that debarment is appropriate in this case, citing 11 alleged violations of law as the basis for this recommendation. *See Secretary's Brief* at 40-41. However, the most serious contentions -- that the respondents required their workers to work 1 to 1 1/2

hours of unpaid overtime virtually every day; that workers were paid only $100 or $125 a day instead of the much higher wage determination rates; that they entered into subcontracts to evade the requirement to pay employees at the wage determination rates; that they encouraged and/or aided subcontractors in preparing fraudulent payrolls; and that some workers were not paid at all for their services -- have either not been proven or were the fault of subcontractors over which respondents had no control. Moreover, the Secretary dropped her entire case against respondents brought under the Otis ANGB contract. The question raised is that since the major elements of the Secretary's case have not been proven, should respondents be subjected to debarment for lesser violations of the DBRA, violations which, by themselves, may not even have led to a case being brought? Complicating the matter further is that RHD's business is devoted exclusively to public contracts (TR 2392), and therefore it could be devastated by debarment.

In *Miller Insulation Co., Inc*., 89-DBA-90 (October 24, 1991), I faced a similar situation, except that the violations which remained after the primary allegation was dismissed were, in my view, *de minimis* and the fault of a former company officer who had not been with the company for over four years. Accordingly, I found debarment to be inappropriate. I was reversed by the Wage Appeals Board, *Miller Insulation Co., Inc*., WAB Case No. 91-38 (December 30, 1992), which in essence held that there is virtually no such thing as a *de minimis* violation of the DBA and the Related Acts and, finding the violations aggravated and willful, debarred the employer and its president .[42]

In this case, I have found that the respondents violated the DBRA in the following respects:

- Respondents paid seven workers at less that wage determination rates for work performed on four Saturdays at Highland Gardens.

- Respondents failed to pay these seven workers overtime rates when applicable for this Saturday work.

- Respondents underpaid these seven workers under the DBRA and CWHSSA in the amount of $852.64.

- Respondents paid David Janvrin and his crew at less than the wage determination rates, resulting in an underpayment of $3300.36.

- Respondents failed to to pay Barbara Baker at the wage determination rate for a painter, resulting in an underpayment of $1789.64.

- Mark Jurczak was underpaid $.40 an hour as a laborer at Highland Gardens, resulting in

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[42]The violations in that case affected 3 individuals who were awarded a total of about $1200 in back wages.

a total underpayment of $44.80.

- Jeffrey Proia was not paid at the proper wage rate resulting in an underpayment of $141.20 for work at Highland Gardens.

- Respondents did not list their employees' hours on the certified payrolls for several Saturdays in which they worked at Highland Gardens.

- Respondents reported the hours of workers at Highland Gardens on the payrolls for Curwin Circle for a period of three weeks.

- Respondents failed to list David Janvrin, Scott Janvrin, Leroy Fowler and Douglas Fowler on the Curwin Circle payrolls for a seven day period at the end of September, 1993.

- Respondents failed to list Barbara Baker on their payrolls for Curwin Circle.

- Respondents violated §5.5(a)(6) of the regulations by failing to insert all of the required provisions contained in §5.5(a) into its subcontracts.

- Respondents violated §5.5(a)(3)(ii)(A) of the regulations by failing to make sure its subcontractors submitted their certified payrolls.

These violations are much more substantial than those in *Miller Insulation*. Respondents owe almost $6500 in back wages for which they at least share in the culpability. In addition, respondents clearly were indifferent to their own obligations under the DBRA as well as to their subcontractors' failures to comply with the DBRA. Finally, respondents owe over $50,000 in back wages due to the actions of three subcontractors which RHD and Nogueira, although not directly culpable, did nothing to prevent.

Since it is clear from the record that RHD is, in essence, Nogueira's alter ego,[43] and Nogueira was directly involved in all of RHD's activities at least through January, 1994, any violations attributable to RHD are also attributable to Nogueira.

The only mitigating factor is that these were respondents' first DBRA contracts, and respondents may not have been aware of all of the arcane requirements of these statutes. In some instances, they may actually have been misled by the interpretations of the Housing Act of 1937 and the DBA by the Department of Housing and Urban Development. But respondents did so many things wrong on their own, and did so little to monitor their subcontractors' compliance with the DBRA, that the impression one is left with is that even if respondents did not deliberately violate the DBRA, they made very little effort to comply with it. I find that respondents were

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[43]Nogueira has not contended at any time during the pendency of this case that he should not be held liable in his individual capacity for RHD's actions during the period in question.

indifferent to the requirements of the DBRA; they also acted in "reckless disregard" of their obligations under the DBRA by failing to take any meaningful steps to assure that they and their subcontractors complied with the DBRA. Accordingly, respondents engaged in willful violations of the DBRA. Moreover, by engaging in so many different violations, I find that their conduct was aggravated as well as willful. That these were the first contracts subject to the DBRA that respondents had entered into is no excuse for respondents' conduct.

Therefore, I find that respondents should be debarred, and for the full three years.

d. Summary

In sum, I have found that respondents are responsible for back wages under the DBRA totalling $7,860.68 for work at Curwin Circle, and for back wages under the DBRA and CWHSSA totalling $52,455.37[44] for work at Highland Gardens. This breaks down as follows:

Curwin Circle

R&B Carpentry -- $2,770.68 (David Baker, Ron Baker and Lynn Tumenas-$923.56 each)

RHD employees -- $5,090.00 (Barbara Baker -- $1,789.64; David Janvrin-$717.59; Scott Janvrin and Leroy Fowler-$827.59 each; and Douglas Fowler-$927.59).

Highland Gardens

H&D Drywall -- $48,577.38 (Edward Boyd-$4,676.05; Fred Rourke-$571.20; Phil Nocella-$5,600.91; Dan Genoter-$8,147.50; Jason Butts-$4,188.80; Matt Raza-$5,068.98; Kevin Powers-$2,252.88; Joseph Conway-$2,706.40; Thomas Coppola-$2,706.40; Harry Auch-$1,894.48; George Stanichuck-$1,894.48; Dan Stanichuck-$1,488.52; Rodney Renaud-$676.60; Dave Zawodny-$1,894.48; Joseph Bulla-$270.64; Joseph Recupero-$811.92; Joseph Storella-$541.28; Philip Vitello-$1,353.20; and Eric Dinsmore-$1,832.66)

Testa Construction -- $3,003.84 (Charles Harmen, Timothy Ulrich and Mark Croce-$1,001.28 each)

RHD employees -- $874.15 (Charles Harmen-$164.49; Mark Croce-$103.66; Timothy Ulrich-$164.49; Mark Jurczyk-$94.55; Jeffrey Proia-$264.70; and David Janvrin-$82.26).

In addition, respondents have committed numerous record keeping and other violations of the DBRA. Finally, respondents are to be debarred for a period of three years for their

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[44]This amount is $164.49 less than the total of the Highland Gardens underpayments listed above, since the underpayment in that amount to Vincent Testa for work on two Saturdays was offset by a much larger overpayment to Testa as a subcontractor. *See supra*.

aggravated and willful violations of the DBRA.

ORDER

IT IS ORDERED that:

1. R.H.D. Construction Co., Inc., and Joseph R. Nogueira, individually, owe back wages in the amounts of $7,860.68 under the Curwin Circle contract and $52,457.37 under the Highland Gardens contract, in accordance with the above decision. These back wages shall be paid from the monies withheld under the two contracts.

2. The remaining withheld monies shall be paid to respondents forthwith.

2. R.H.D. Construction Co., Inc., and Joseph R. Nogueira individually shall be ineligible for a period of three years to receive any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. §5.1.

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JEFFREY TURECK
Administrative Law Judge